

**No. 82-1724**

**In The  
Supreme Court of the United States**

**OCTOBER TERM, 1983**

Office - Supreme Court  
**FILED**  
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ALEXANDER L. STEVA  
CLERK

**STATE OF NEW YORK,**

*Petitioner,*

**vs.**

**ROBERT UPLINGER and SUSAN BUTLER,**

*Respondents.*

**ON WRIT OF CERTIORARI TO THE  
NEW YORK STATE COURT OF APPEALS**

**JOINT APPENDIX**

**RICHARD J. ARCARA**  
District Attorney of Erie County  
200 Erie County Hall  
25 Delaware Avenue  
Buffalo, New York 14202  
(716) 855-2424  
*Counsel for Petitioner*

**WILLIAM H. GARDNER**  
Hodgson, Russ, Andrews,  
Woods & Goodyear  
1800 M & T Plaza  
Buffalo, New York 14203  
(716) 856-4000  
*Counsel for Respondent*  
*Robert Uplinger*

**ROSE H. SCONIERS**  
The Legal Aid Bureau  
of Buffalo, Inc.  
Convention Tower  
43 Court Street  
Buffalo, New York 14202  
(716) 853-9555  
*Counsel for Respondent*  
*Susan Butler*

**PETITION FOR CERTIORARI FILED APRIL 22, 1983.  
CERTIORARI GRANTED OCTOBER 3, 1983.**

## TABLE OF CONTENTS

	Page
Relevant Docket Entries	
A. New York v. Robert Uplinger.....	<i>ii</i>
B. New York v. Susan Butler.....	<i>iii</i>
Butler Transcript of Proceedings dated May 8, 1981 and May 28, 1981 .....	1
Uplinger Notice of Motion and Affirmation dated August 8, 1981 .....	12
Uplinger Transcript of Proceedings dated August 24, 1981 and August 25, 1981.....	17
Uplinger Transcript of Proceedings dated October 22, 1981 .....	106

### PLEADINGS REPRODUCED IN PETITION FOR CERTIORARI

#### Decision in Question

Uplinger and Butler Remittitur and Memorandum of  
New York Court of Appeals dated February 23, 1983  
[Memorandum reported at 58 N.Y.2d 936, 460  
N.Y.S.2d 514, 447 N.E.2d 62 (1983)]..... Appendix A&B

#### Other Decisions

Uplinger and Butler Memorandum and Order of Erie  
County Court (McCarthy, J.) dated May 3, 1982  
[Reported at 113 Misc.2d 876, 449 N.Y.S.2d 916  
(County Court, 1982)]. .... Appendix C

Uplinger Memorandum and Order of Buffalo City  
Court (Drury, J.) dated November 9, 1981 [Reported  
at 111 Misc.2d 403, 444 N.Y.S.2d 373 (City Court,  
1981)]..... Appendix D

Butler Decision and Order of Buffalo City Court  
(Drury, J.) dated September 8, 1981 [Reported at 110  
Misc.2d 843, 443 N.Y.S.2d 40 (City Court, 1981)].  
..... Appendix E

**RELEVANT  
DOCKET ENTRIES**

**A. New York v. Robert Uplinger**

- 8/7/81 Defendant Uplinger arrested for violation of New York Penal Law §240.35-3
- 8/8/81 Motion papers (Notice of Motion and Affirmation of William H. Gardner, dated August 8, 1981) served by Uplinger challenging constitutionality of Penal Law §240.35-3.
- 8/14/81 Arraignment, Buffalo City Court (Drury, J.).
- 9/23/81 Responding Affirmation of Thomas W. Lokken, Assistant District Attorney served in opposition to Uplinger's motion.
- 9/24/81 Pre-trial hearing held before the Buffalo City Court (Drury, J.) on Uplinger's motion for dismissal based on alleged unconstitutionality of statute, with testimony of various witnesses being taken.
- 9/25/81 Pre-trial hearing continued; trial conducted (Drury, J.).
- 10/22/81 Pre-trial hearing reopened at request of Trial Judge, with consent of counsel.
- 11/9/81 Memorandum Decision and Order issued by Buffalo City Court (Drury, J.) denying Uplinger's motion and finding defendant guilty [See Petition for Certiorari, Appendix D].
- 11/16/81 Uplinger sentenced; Notice of Appeal filed.
- 12/14/81 Order of Erie County Court (Dillon, J.) that appeals on Uplinger and Butler be heard jointly.

- 5/3/82      Memorandum and Order of the Erie County Court (McCarthy, J.) affirming Robert Uplinger's conviction and reversing dismissal of information as to Susan Butler. [See Petition for Certiorari, Appendix C].
- 5/25/82      Order granting leave to appeal to the New York Court of Appeals entered (Jasen, J.).
- 2/23/83      Memorandum Decision and Remittitur of the New York Court of Appeals reversing conviction and declaring New York Penal Law §240.35-3 unconstitutional. [See Petition for Certiorari, Appendix A&B].
- 4/22/82      Petition for Certiorari filed.
- 10/3/83      Order of United States Supreme Court granting Certiorari.

**B. New York v. Susan Butler**

- 4/1/81      Defendant Butler arrested and arraigned for violation of New York Penal Law §240.35-3.
- 5/8/81      Proceedings on oral motion to dismiss based on unconstitutionality of statute. Testimony presented.
- 5/28/81
- undated      Memorandum Decision of Buffalo City Court (Drury, J.), granting motion and finding statute unconstitutional as applied to alleged prostitutes in heterosexual situations. [See Petition for Certiorari, Appendix E].
- 9/8/81      Order of Buffalo City Court (Drury, J.) dismissing charge.
- 10/2/81      Notice of Appeal filed by People.



- 12/14/81 Order of Erie County Court (Dillon, J.) that appeals on Uplinger and Butler be heard jointly.
- 5/3/82 Memorandum and Order of the Erie County Court (McCarthy, J.) reversing Butler dismissal. [See Petition for Certiorari, Appendix C].
- 5/25/82 Order granting leave to appeal to the New York Court of Appeals entered (Jasen, J.).
- 2/23/83 Memorandum Decision and Remittitur of the New York Court of Appeals reversing decision below and declaring New York Penal Law §240.35-3 unconstitutional. [See Petition for Certiorari, Appendix A&B].
- 4/22/83 Petition for Certiorari filed.
- 10/3/83 Order of United States Supreme Court granting Certiorari..

STATE OF NEW YORK — COUNTY OF ERIE  
CITY COURT OF BUFFALO

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THE PEOPLE OF THE STATE OF NEW YORK,

vs.

SUSAN BUTLER,

*Defendant.*

DOCKET NO.: 4C-53628.

[A37]

\* \* \*

KENNETH BURGSTAHLER, 74 Franklin Street, Buffalo, New York, having been duly called and sworn as a witness on behalf of the People, was examined and testified as follows:

EXAMINATION BY THE COURT:

Q. I understand from the information you arrested on [sic] Susan Butler at an address at 64 Reed Street back on April 1st, 1980 [sic], at about 4:00 in the morning? A. No, Your Honor. That's on Military time, that was twenty minutes to 1:00.

Q. I'm sorry. Sir, could you tell me what led up to this? A. Yes, Your Honor. We were assigned to the Vice Squad and we were checking the Genesee Street area which is a well known area for prostitutes to congregate, I was driving an unmarked police car and I noticed Susan Butler who I have arrested several times in the past, she's a convicted prostitute, she was standing on the corner of Genesee and Camp, this is one block east of Jefferson. I got into a position where she didn't notice the car and I watched her for approximately ten minutes, during this period I noticed

[A38]

her waving to the passing vehicles and at one point I noticed a Buick pull up on David Street — excuse me. Did I say Camp Street before?

Q. Yes. A. I'm sorry, David. I noticed a Buick pull up on David Street. Susan Butler walked up and the car pulled up to the side and it appeared she was having a conversation with the male for approximately two or three minutes. At this point Susan Butler walked around the side of the car, entered the vehicle and the car then backed down David Street. At this point I drove around the block, I walked up to the car and I noticed the defendants were engaged in oral sodomy.

Q. Oral sodomy? A. At this point I identified myself and again Susan Butler at this point knew me and I arrested both defendants for loitering to commit a deviate act.

Q. You didn't arrest them for the deviate act because at that point at that date the Court of Appeals had affirmed People versus Onofre and had stricken the sodomy statute? A. Right. I did not arrest them for the sodomy statute because that was stricken out, but in my opinion under that loitering section they matched every degree of crime. Susan Butler

[A39]

could have been arrested for loitering for the purpose of prostitution because — being the fact I had to prove something on the male when they're engaged in this act of sodomy, I believe at that point they matched loitering to commit a deviate act.

Q. If you remember, his case is now disposed of — you may not know this — but through an adjournment in contemplation of dismissal with the District Attorney's Office. A. I was here yesterday.

Q. Yes; that's true. So, you feel from what you saw as to what she did in trying to stop different cars — how many cars did she try to stop? A. There were three or four that she waved to during this ten minute period.

Q. You feel under the cases you've had here in City Court, I think the main case for the loitering for the purpose of prostitution is People versus Smith and the Court of Appeals upheld that sort of charge for loitering for prostitution; you felt you had enough there for at least prostitution, that you wanted to encompass both of them? A. Yes. I did.

Q. Is this charge as a violation or misdemeanor? A. No. It's only a violation.

[A40]

THE COURT: Do you want to question, either side?

DIRECT EXAMINATION BY MR. SLADE:

Q. Officer, did you have any evidence in this case of a fee for this service or that a fee had been paid for this act of oral sodomy? A. Well, I didn't have any evidence up to that time. Off the record the male did tell me he paid a fee.

Q. This was after? A. This was after, this was off the record.

Q. So, it was only after the arrest of the male that you discovered some evidence that a fee had been paid?

MISS THOMAS: I'll object to this line of questioning, it's not relevant to the issue before the Court.

THE COURT: It's also hearsay, sustained.

MR. SLADE: Your Honor, the relevance of this is in defining why the officer charged this particular charge rather than some of the other prostitutional offenses which were available to him potentially.

THE COURT: Well, if you can tie it in any other way.

BY MR. SLADE:

Q. So, at the point you approached the car, you had no direct evidence of a fee? A. That's right. I did not have any evidence and—

[A41]

Q. And you've testified that it was your intention to bring charges against both parties in this instance? A. Yes, because I felt he was as guilty as she was.

Q. Is this a normal routine you do in these cases, arrest both parties? A. Yes. It is.

MR. SLADE: That's all I have, Your Honor.

CROSS EXAMINATION BY MISS THOMAS:

Q. Officer Burgstahler, you said you saw my client waving to cars? A. Yes. I did.

Q. Did you hear her engage in any conversation with anyone in these cars? A. No. I did not.

Q. Did you hear her engage in any conversation with her co-defendant in this case? A. No. I did not.

Q. Did you see any money exchange hands? A. No. I did not.

Q. How far away from my client were you when you first cited [sic] her? A. Well, I was driving a police car and I passed by her, she was on the corner and I passed by her when I set-up for

[A42]

observation, I was probably two to three hundred feet away.

Q. Two to three hundred feet away? A. That's correct.

Q. And all you saw her doing was waving at cars? A. That's correct.



Q. You don't know why she was waving at the cars, do you, of your own direct knowledge? A. Well, being an experienced Vice Officer—

Q. I said of your own direct knowledge? A. No.

THE COURT: Anything else?

MR. SLADE: Nothing further.

THE COURT: What it boils down to, the reason you charged both of them, is to get him because otherwise you would have charged her for loitering for the purpose of prostitution?

THE WITNESS: That's correct.

THE COURT: Okay, anything else?

MISS THOMAS: Nothing.

THE COURT: Thank you, Officer. All right, It would appear with his case dismissed do you want to proceed with this prosecution against her?

MR. SLADE: His case is not yet dismissed.

[A43]

THE COURT: It's an A.C.D.

MR. SLADE: It's at the A.C.D. stage.

THE COURT: Yes.

MR. SLADE: We do.

THE COURT: It's too late now to change it because she was charged under one section where according to the officer she very well could have been charged with loitering for the purpose of prostitution, if you were to change the charge now it would be dismissed for lack of speedy trial as a violation. Do you want to stick with prosecuting her?

MR. SLADE: Yes. The thinking here is the A.C.D. for the "John" in the situation is the fact of having his name printed in the papers, going through the Court proceeding, a man with no prior record who is rather embarrassed by this situation, it serves as a specific deterrent [sic] against further conduct of this type by him and also as a general deterrent [sic]. The man's name appeared in the papers, people see that and perhaps avoid making this type of street conduct. We prosecute the women with the prostitution records, in this instance, feeling she's more culpable, she's out there as a

[A44]

professional street walker engaging in this routinely and we prosecute these to a conviction as charged or to a trial. At any rate, because we're feeling their conduct as being a more serious crime to the public.

THE COURT: Officer Burgstahler, one other question. There's no question of anybody being in any shops or property owners or people being offended by this at this time of night or this area because there's nothing going on there except prostitution.

THE WITNESS: Well, I suppose you could say that.

THE COURT: In that area, that's close to downtown, there's no body downtown saying well, these people are disturbing my sleep or harming my store or my business because there's no business there or no people there. Is that right?

THE WITNESS: Well, I suppose you could say that but I've got a job to do to enforce the laws of prostitution.

THE COURT: I know we're dealing with prostitutes being charged under the deviate intercourse statute—

THE WITNESS: Right.

THE COURT: That sort of thing?

[A45]

THE WITNESS: Yes.

THE COURT: Okay, Captain Kennedy will be next.

(CAPTAIN) KENNETH KENNEDY, 74 Franklin Street, Buffalo, New York, having been duly called and sworn as a witness on behalf of the People, was examined and testified as follows:

EXAMINATION BY THE COURT:

Q. You're the captain in charge of the Buffalo Police Department? A. Yes.

Q. You've been doing that for how long? A. For approximately twenty-five years, now.

Q. You've heard the testimony of Officer Burgstahler? A. Yes.

Q. In light of the Onofre case where I discussed with you a minute ago on the record, I believe, which says that there's no problem that they've stricken down the sodomy statute in New York State, the consensual sodomy statute, the Supreme Court went along with that or at least didn't hear the appeal so by doing that they affirmed it. In these situations obviously, your police will not be arresting anybody for loitering for the purpose of deviate sexual intercourse for anything other than prostitution or homosexual offenses?

[A46]

A. Yes. That's generally it, Your Honor, or these open acts that are taking place, we're using that section now where we formally used to use it for sodomy acts and they also use it where there's solicitation by homosexuals, they'll use that section.

Q. But when you say open acts, you're not using this, you only use this to connect with some sort of prostitution where they suspect or know it's prostitution? A. No, Your Honor. If anyone, it wouldn't necessarily have to be a prostitute but generally there's evidence that indicates she is involved in prostitution but if anyone was to get into a car and drive to a public street and commit this type of act we would use that section, even if it was two men we would use that section.

Q. The two men situation, that's what I mean. Let's say your officers or some officer found a couple in a park and there's no evidence of prostitution, they wouldn't be arrested, would they, male and female? They never have, have they? A. Depending on the circumstances generally — well, not if it would indicate that there were no involvement in prostitution but if they're in the area where there's prostitutes, where there's homosexuals or where we have complaints of people being disturbed and of these acts being committed

[A47]

where people can see them, many times we'll get complaints from people who are in an apartment or in a room and they look out and these acts will be taking place.

Q. That would be downtown, maybe Johnson Park area? A. There, Your Honor, yes. We have them there and in Genesee Street, Genesee and Spring.

Q. You got complaints in there? A. Yes. An awful lot of complaints. In fact, there's some woman that calls me and calls the Police Commissioner, she's wrote to the Mayor and she is very very much disturbed because people pull in the backyard and they commit these acts right in front of her, in front of her to the extent she's looking out her apartment window and everything is right in plain view.

Q. This, to the best of your knowledge, would be in the same area or near the same area as where the prostitutes work?

A. Yes. The whole Genesee Street area and David Street is up a little further but then Spring Street is one where we had particular bad complaints and the business people around there are complaining. In fact, we have made arrests in sodomy situations at 12:00 o'clock noon on the street in that area where school children were going to school and simply by their being in the presence on the sidewalk they

[A48]

could look right in the car and see this man and woman in an act of sodomy.

Q. This again, would be prostitution related? A. Yes, it would be prostitution related, even though there wouldn't be any conversation or any direct evidence except she would be on the corner and he would be cruising around in the street for quite some time; but nothing we can prove to substantiate the charge of prostitution but I would say it would indicate prostitution.

Q. Officer Burgstahler said he had proof of prostitution but didn't want to use it to get the male. Is that right? A. Well, yes, if there's no evidence against him.

Q. Now, if there would have been further investigation and other evidence would have developed concerning the prostitution then they would be — both could have been arrested for prostitution? A. True, male and female.

Q. So you don't believe Onofre should be applied for loitering for the purpose of prostitution? A. Pardon?

Q. You don't believe the Onofre decision should be applied to this sort of situation? A. I don't feel the Onofre case should be applied for loitering



[A49]

for the purpose of committing deviate sexual intercourse.

Q. And the reason is you have this activity going on?  
A. Right.

Q. In cars and it's related to prostitution? A. Yes. It is definitely related to prostitution.

Q. And these situations where you can't prove it through the ordinary loitering for the purpose of prostitution? A. That's correct.

Q. And if there isn't enough evidence of loitering for the purpose of prostitution then you have the two people involved in this act so therefore they are both arrested and we apply this section? Of course, the other — some proposals are that they make it illegal to have sexual displays in public, in a car would be a situation construed as public — A. Yes.

Q. — what do you think about that? A. We actually have some type of law that we can apply. If the sodomy laws are stricter then there should be some type of law that would apply more directly to a type of ordinary sex act or deviate sex act, but, mainly open sex acts, public lewdness or something like that should be more specific so we could apply that. My only interest is in protecting

[A50]

the public from these things on the appearance of it. Some people may be under the impression that they're in private but it's not as if they were in a park or down by a railroad yard where there's no houses around, it's surprising the amount of people that are watching activity and that are subject to it and deem it offensive. I not only had this one woman call me but I had another woman who was constantly calling me who said they were performing these acts day and night in the Genesee Street area.

Q. Of course, this again, does not have anything to do with the homosexual activity? A. No.

Q. That's entirely something different? A. Right.

THE COURT: I understand your feeling on that. Does anybody want to ask any questions?

MR. SLADE: No. I don't have any questions.

MISS THOMAS: I don't have anything.

THE COURT: Thank you very much, Captain Kennedy. I'll reserve on this. That's all.

\* \* \*

STATE OF NEW YORK — COUNTY OF ERIE  
CITY COURT OF BUFFALO

THE PEOPLE OF THE STATE OF NEW YORK,

vs.

ROBERT UPLINGER,

*Defendant.*

DOCKET NO.: 4C-53993

[R38]

S I R :

PLEASE TAKE NOTICE that on the Information herein, dated August 7, 1981, and on the annexed affirmation of William H. Gardner, dated August 8, 1981, defendant will move this Court (Hon. Timothy J. Drury, Buffalo City Court Judge, presiding) at the arraignment of the defendant herein, scheduled to be held before Judge Drury on Friday, August 14, 1981, at 9:30 A.M. or as soon thereafter as counsel can be heard, for an order dismissing the Information on the ground that the same fails to define an offense under Penal Law Section 240.35-3 and, in the alternative, on the ground that Section 240.35-3 of the Penal Law is unconstitutional for the reasons set forth in the annexed affirmation of William H. Gardner. PLEASE TAKE FURTHER NOTICE, that if the motion referred to herein is not heard by Judge Drury at the time of the arraignment, the same will be presented to him and argued by counsel for the defendant [R39] at the adjourned date to be set by him at the time of arraignment.

Dated: August 8, 1981

WILLIAM H. GARDNER

*Hodgson, Russ, Andrews, Woods & Goodyear, Attorneys  
for Defendant*

1800 One M & T Plaza

Buffalo, New York 14203

Telephone: 856-4000

TO: Hon. Edward C. Cosgrove  
Erie County District Attorney

[R40]

[Uplinger Title and Heading omitted]

STATE OF NEW YORK)

): SS.

COUNTY OF ERIE )

I, WILLIAM H. GARDNER, being a member of Hodgson, Russ, Andrews, Woods & Goodyear, attorneys of record for the defendant, make the following statement as an affirmation, in lieu of an affidavit, under the penalties of perjury.

1. Defendant has been charged with the offense of loitering for deviate sexual purposes under Penal Law Section 240.35-3, allegedly committed on August 7, 1981. The charge has been laid by an Information dated August 7, 1981, a copy of which is annexed hereto as Exhibit A. *(NOTE: The Information, attached as Exhibit A to this Affirmation, is reproduced at page R-36 of this Record and is not separately reproduced as an Exhibit to this Affirmation. Please see page R-36.)*

2. Defendant moves to have the Information dismissed on the ground that the same fails to define an offense under Penal Law Section 240.35-3 for the reason that the Information does not include facts [R41] showing that defendant remained in a public place "for the purpose of engaging, or soliciting another person to engage, in deviate sexual intercourse or other sexual behavior of a deviate nature" (Penal Law §240.35-3). Specifically, there is nothing in the Information which, on its face, indicates that defendant had the purpose of engaging in any deviate sex act with the officer. The statement attributed to the defendant, "[W]hy don't you drive me to my place and I'll blow you", does not, by itself, describe a sex act contemplated in the thinking of the defendant. No facts are included in the Information to show that these words, in the sense used by the defendant, denoted a proposed sex act or what that sex act was

or whether it was, in the words of the statute, a proposed act of "deviate sexual intercourse or other sexual behavior of a deviate nature".

3. Alternatively, defendant moves for the dismissal of the Information on the ground that Section 240.35-3 of the Penal Law is unconstitutional for any one of the following reasons:

A. Section 240.35-3 of the Penal Law (hereinafter the "statute") is unconstitutionally vague in that the words "deviate sexual intercourse" are not defined in a way which is [R42] applicable to the statute. The term is defined in section 130.00-2 of the Penal Law, but that section is, by its terms, only "applicable to this article" (i.e. Article 130 — Sex Offenses) and is not made applicable to Article 240.

B. Section 240.35-3 of the Penal Law is unconstitutionally vague in that the words "or other sexual behavior of a deviate nature" are not defined anywhere in the Penal Law and are not so certain that they give notice to the public as to what is required to be done or not done in order to comply with the statute.

C. Section 240.35-3 of the Penal Law is unconstitutional because it violates the defendant's rights to due process of law and freedom of speech. This is so because it prohibits the discreet, non-obtrusive solicitation in a public place of sexual conduct to be performed in a private place, even though such sexual conduct in a private place is lawful, pursuant to the holding of the Court of Appeals under *People v. Onofre*, 51 N.Y.2d 476 (1980). [R43] As such, it violates the defendant's rights of free speech, which permit him to invite another person to his apartment to engage in conduct not constituting a crime or offense under the laws of the State or of the United States. In the context



of free speech rights under the United States Constitution, the activity engaged in by defendant is the same as that found to be protected by free speech guarantees by the Supreme Courts of California (*Pryor v. Los Angeles Municipal Court*, 25 Cal.3d 238 [1979]) and of Massachusetts (*Commonwealth v. Sefranka*, — Mass. —, 414 N.E.2d 602 [1980]). For purposes of this motion, defendant asserts both his free speech rights under the United States Constitution and under the New York Constitution.

D. Section 240.35-3 of the Penal Law is further unconstitutional for the reason that it constitutes an impermissible intrusion on defendant's rights to due process and to free speech (free thought), since it declares one a violator for merely being in a public place and thinking lascivious thoughts. All that is required for [R44] guilt is the physical location of defendant in a public place and the existence of a mental state of a "purpose" or intent as described in the statute, whether he acts on the purpose or intent or not. This ground of declaration of unconstitutionality has been approved by the Supreme Court of Colorado (*People v. Gibson*, 184 Col. 444, 521 P.2d 774 [1974]).

E. The statute is further unconstitutional for the reason that it violates defendant's rights to the equal protection of the laws. This is so under the following circumstances:

(a) Although "deviate sexual intercourse" is lawful in private places to the same extent as is so-called "normal" heterosexual conduct, loitering for the purpose of soliciting the former is made unlawful, while loitering for the purpose of soliciting the latter is lawful.

(b) The engagement in sexual conduct of a deviate nature and similar engagement in sexual conduct of a "normal" nature in a public place are equally unlawful as "public [R45] lewdness" under Penal Law Section 245.00. However, loitering for the purpose of the former is unlawful, while loitering for the purpose of the latter is lawful.

The Legislature has not made a rational or proper classification for purposes of this section. Without limiting his grounds under this motion, defendant argues that the People must show a compelling justification for the classification which has been made and that, absent that, the law should be found to have violated the defendant's rights to the equal protection of the laws.

As to all grounds of unconstitutionality urged herein, defendant rests his argument under both the United States Constitution and the equivalent protections of the New York Constitution. If the Court determines that the law is not unconstitutional under the United States Constitution, defendant requests that the Court nonetheless determine that under a broader reading of the New York Constitution, the law is unconstitutional.

Dated: Buffalo, New York  
August 8, 1981

s/William H. Gardner  
William H. Gardner

STATE OF NEW YORK — COUNTY OF ERIE  
CITY COURT OF BUFFALO

THE PEOPLE OF THE STATE OF NEW YORK,

vs.

ROBERT UPLINGER,

*Defendant.*

DOCKET NO.: 4C-58993.

\* \* \*

[Proceedings of September 24, 1981]

[R61]

CAPTAIN KENNETH KENNEDY, residing 3160 Hopkins Road, North Tonawanda, New York, having been duly called and sworn as a witness on behalf of the People, was examined and testified as follows:

DIRECT EXAMINATION BY MR. LOKKEN:

[R62]

Q. Captain, where are you employed? A. I'm employed by the City of Buffalo, Department of Police.

Q. And what's your unit? A. I'm a captain in the Buffalo Police Department; I'm in charge of the Bureau of Vice Investigation.

Q. And how long have you been in that position? A. Approximately twenty years.

Q. And Captain, in the course of your career in the Police Department, particularly in the Vice Squad, have you had occasion to direct your subordinates, your Police Officers, in certain areas for the purposes of arresting people for loitering on a number — on any number of grounds that may have been illegal? A. Yes, sir. I have.

Q. And does that include loitering for the purpose of engaging or soliciting other people to engage in deviate sex under Section 240.35-3? A. Yes, sir.

Q. And what circumstances do you direct your men to patrol a certain area? A. Well — of course they're instructed when they first come into the squad, they're given specialized training and they're instructed to work in areas in plain clothes where we have

[R63]

complaints or where we have information that there are possible suspects in certain areas of the city. Generally we're responding to a complaint.

Q. And what areas of the city, are now subject to those kinds of complaints? A. Well, generally, downtown areas is the heaviest concentration for vice investigations and also around North and Delaware and Genesee Streets, Elm, and in through that area.

Q. Would you include LaSalle or Front Park, in that area? A. Yes, that's definitely included.

Q. Captain, what do you know of the sorts of problems that citizens encounter in those areas that are frequently — A. Would you repeat that?

Q. What sort of problems do you know of that citizens might encounter in the areas frequented by loiters, [sic] specifically those who loiter for the purpose of engaging in deviate sex? A. Based on the complaints we receive the citizens are disturbed by activity of solicitation, appearance of street walkers, the prostitutes and also of suspected homosexuals and they complain about being solicited. They complain that their youths are being bothered, being solicited by these men and they also complaint [sic] of heavy concentration of men using

[R64]

obscene gestures and obscene language and movements, and fondling one another and we also have numerous complaints of open sex acts taking place in automobiles. We have complaints of people in the LaSalle Park area where the young lads are playing baseball and so on and being solicited. I have numerous complaints from other Police Officers as to conditions of that nature. And there's men and women that complain about the North Street area of groups of men that are annoying to them and soliciting them and bothering them on the street.

Q. Do you have any idea in general what sort of inquiries are made of these citizens? A. Pardon?

Q. What sort of inquiries or approaches are made by these people who loiter or passers by? A. Well, generally, different things. They say — this one woman complained and said —

THE COURT: Would you wait a second. I'll be right back.

(WHEREUPON, COURT STOOD IN RECESS.)

THE COURT: Excuse me Captain. Proceed. You were talking about solicitation of people in the area by

[R65]

alleged homosexuals and you talked about inquiries and you asked what sort of inquiries —

BY MR. LOKKEN:

Q. What sort of inquiries are made to passers by as they may travel down the streets directed by loiters? [sic] A. Well one woman told me, she said that her teenage boy, they approached him and that they actually asked him if he wanted to have sex with him and she said that he came home and he was very much disturbed by it and he said everytime he goes out of the house

there's always men standing around certain areas of the neighborhood and that they solicit them and she told me that she didn't think it was right and she wanted to know if the police could do something to correct that situation.

Q. And is it your opinion that solicitation is open in a sense that a lot of strangers are confronted?

MR. GARDNER: In keeping with the remarks I made in the beginning, I'm forbearing of making the usual objections of hearsay. I'll accept the Captain's opinion but I think I have to remind all of us that this is not an occasion for an opinion testimony and nor is there any

[R66]

indication that the Captain is an expert as to whether people who bring complaints to him are telling the truth or anything of that sort. In the interest of expediting the matter I'm not going to object to this because I believe the whole hearing is irrelevant to the motion.

THE COURT: You're just drawing my attention —

MR. GARDNER: I want the record to reflect.

THE COURT: You're drawing my attention to a problem.

MR. GARDNER: I don't object to the question, perhaps we can move along. He's not an expert, he's not qualified as yet, if you want to make him an expert —

MR. LOKKEN: What precisely is the nature of the objection?

THE COURT: I think he was more drawing my attention to the hearsay nature of this testimony and the fact that the Captain is not qualified as an expert.



MR. GARDNER: What I'm saying, Your Honor, I'll object formally on that on the question that it asks an opinion of the nature of the problem as the Captain perceives it in the community. It's not subject for opinion testimony and there's been no indication that the Captain is an expert on the subject, everything he's testified about

[R67]

is hearsay. I haven't heard that the Captain is out on the street himself, I haven't heard he's out observing these alleged events and on that basis I'm making an objection.

THE COURT: Sustained. Go on.

MR. LOKKEN: Is there any possibility of reply?

THE COURT: Go on.

BY MR. LOKKEN:

Q. You've been in the Vice Squad for twenty years? A. I've been Commander of the Vice Squad for twenty years. I've approximately served about twenty-eight years on the Vice Investigations at all levels; I served as a plain-clothes officer and also I've served as a Lieutenant in command of an individual squad and as a Captain in command of all of the units of the Vice Investigation.

Q. When receiving complaints I assume certain particulars are described to you. Have you had over the course of your time in the Vice Squad the opportunity to confirm whether these complaints appear to be legitimate or not? A. Yes. Numerous complaints we've received and then I personally have made visits to the scene in some cases and verified them. And then, also, there were verified — they

[R68]

were verified after I had directed my men to make an investigation. And, they've gone there and made arrests in response to various complaints.

Q. Are most of these complaints directed by people who claim not to have known the person who approached them?

A. Yes. Most of them are. Most of them say they don't know who they are but they simply approached them and that there's groups of these men in certain areas and that they — in fact, one of them said he thought it looked like a stag line and he was fearful of passing because there were so many men lined up that he didn't know what they were going to do to him; and he said he was afraid that he didn't know whether they would trip him or grab him or whatever they would do.

Q. Is there an instance of violence recorded in certain areas where perhaps those who engage in such loitering and citizens have confronted each other that you're aware of?

MR. GARDNER: I'll object and point out to the Court there's absolutely no suggestion in the complaint before the Court that there was any violence involved or suggested or any [sic] in any way involved in the situation.

THE COURT: I understand. I'll hear the question, overruled.

[R69]

THE WITNESS: May I answer?

THE COURT: Yes.

THE WITNESS: Yes. There have been acts of violence; there have been shootings, there have been stabbings, there have been numerous assaults in areas where we have received some of these complaints.

MR. LOKKEN: Okay —

THE WITNESS: And if I may add, sir, there have also been robberies. There's been robberies and assaults against some of the people in the areas.

MR. LOKKEN: Nothing further at this point.

THE COURT: Mr. Gardner?

CROSS EXAMINATION BY MR. GARDNER:

Q. With regard to the violence that you've referred to, Captain, there have been instances of violence in the middle part of the City of Buffalo for many years relating to a lot of different circumstances. Isn't that correct? A. There has been violence, yes, sir.

Q. And there's been a lot of violence that has been in some way related to drinking and bar activity. Is that correct? A. Yes, sir. I've observed that.

[R70]

Q. And has there not also been violence with respect to encounters between males and females which may or may not have had sexual overtones of some sort? A. Yes. I would say that.

Q. Sweethearts, boyfriends, girlfriends, that type? A. Yes.

Q. Have you had any occasions where you've had — that you can recall, where you've specific allegations of violence in connection with a male homosexual inviting another homosexual to his private residence for sexual purposes? A. Yes. There's been numerous investigations where male homosexuals have taken homosexuals or vice versa, or whatever have gone to the hotel rooms and there's violence that has occurred.

Q. And have you had also violence in connection with prostitution in the area? A. Yes, sir.

Q. Now you enforce, do you not, the Loitering for Deviate Sex Statute, basically against the groups which we would call prostitutes or suspected prostitutes on the one hand, and homosexuals on the other. Is that correct? A. Yes. I would say that's correct.

Q. In fact, Captain, is it not correct that in connection with

[R71]

the training you give your men and the instructions you give to them for the enforcement of the statute, you draw their attention to these particular groups as groups that should be controlled through the statute. A. Yes. We call it to their attention, particular conditions that exist, that if evidence presents itself indicating solicitation or an act taking place in their presence that they're to make an arrest whether it be a prostitute or whether it be two males engaging in an open sex act.

Q. You referred to an "Open Sex Act". It is true, is it not, Captain, that in many cases where an allegedly gay male is arrested under this statute, open sex has not occurred? A. No. That's true. It would be an offer for open sex and then if the evidence is gone enough they will make an arrest.

Q. Isn't it also true, however, sir, that if the offer is to have sex in a private residence, you still make an arrest? A. Yes. We make an arrest.

Q. So when you refer to open sex you're talking about sexual activity on the streets, in the parks, or in automobiles. Isn't that correct? A. Well, yes, since the sodomy laws have been struck down, we've been using that section where we observe people in areas where we've had complaints and so on; and then where

[R72]

we observe them engaging in open sex acts.

Q. But even before the sodomy law was struck down, it's correct, is it not, that your men will go into the areas that you described where there had been complaints or where you had information that suspected homosexuals or prostitutes were present and make themselves available for the kind of solicitation including solicitation in a private residence?

A. Well, they would be in an area on investigations and if they were approached and the conversation was such of a deviate sexual nature, then they would make an arrest.

Q. When you say "On investigations", do you mean to include downtown, the situation where they are on, say North Street for the purpose of checking out claims there that there are homosexuals loitering in that area? A. Yes. Claims and then complaints and observations of seeing people in the situations where there apparently are solicitations made or approaching other people. They will work there, that's where the investigations will be.

Q. In the complaints that you've gotten over the years, Captain, have you gotten complaints from women who have been approached with suggestions by males for sexual activity between the two of them?

[R73]

A. Now, how do you mean that, counsellor. Do you mean—

Q. For example, do you ever have complaints made to you directly or through your men that women are walking the street and are approached by men who suggest sexual activity and the women find it offensive? A. Yes. I have had complaints of that nature where there have been complaints of being solicited for prostitution purposes. Women that were walking down the street have complained to my office and to me personally that they were being bothered by men who were curb crusing [sic]

and soliciting them for the purpose of prostitution when they weren't prostitutes and were very much disturbed by that. It has happened.

Q. Has it also happened that women have just been approached for sex activity with no money being suggested? A. I don't recall of any complaints like that, counsellor.

Q. You talked in your testimony about specialized training which you give to new men in your squad? A. Yes.

Q. Would you describe for the Court what the nature of that training is and what they're taught and led to do specifically with regard to enforcing this statute? A. Well, it's generally that they're taught by officers that have been on the street for a long time. First of all,

[R74]

they're made familiar with the section that relates to that type of violation and then they are told, they are shown informations, they're shown the way — sometimes they are taken to the area and they're shown how the older officers or the officers that have been on the squad for a while, how they make an investigation. And then they are talked to and I talk to them and some of the other officers talk to them and so on, and explain to them what the law [sic] is. They explain to them how these cases can be very very damaging to an individual's reputation in the [sic] community and they're told never, never, never under any circumstances to bring in a case that they may be doubtful about as far as the evidence that they are taught as required and the evidence that's — the evidence as it presents itself. They're told we never want them to perjure themselves, that they don't want an arrest unless it's considered a good arrest by them as to check with the other officers when they first go on the street to make sure because we don't want to arrest anyone on this type of charge unless we're positively certain of what conversation took place and what action took place.



Q. In giving that advice, Captain, is it fair to say you're aware of the statute as particularly threatening to

[R75]

individuals who might be charged with this offense if in fact they weren't guilty? Different, say, then something like disorderly conduct or something of that sort? A. No. We try to be very very definite about it. In other words, there is many guidelines that are — that have set their standards that would protect or almost make it impossible for someone to become involved without a great deal of evidence.

Q. Now, when your men go out on the street, particularly the younger men who recently have had training, are they given any instructions as to how they should dress or how they should demean themselves so as to be accepted, say, by a gay person as an apparent gay potential partner? A. Part of their instructions now, for instance, if it pertains to a prosecution [sic] investigation or homosexual investigation, we tell them just look like an ordinary man would that's out on the town, that's out looking for a good time. And usually that's an expression that's used, that they should just look ordinary. We don't necessarily tell them, now that isn't to say that one of the other officers might say to wear a red sweater or a clean sweater or something similar to that, but actually the — we do not tell them to wear short shorts or something similar to that anymore than we

[R76]

would do with the police women to wear sexy looking clothing or anything, we just tell them ordinary street clothes. Maybe a little on the sporty side but we do not give them advice [sic], in other words, to wear clothing out of the ordinary.

Q. But you would expect of course that your officers would appear in such a context that they might be interested in this

kind of thing, you wouldn't send a uniformed officer out to do this work? A. Positively not. He would wear civilian clothes, he would conceal his pistol equipment.

Q. And if he were asked by some individual that he was having a conversation with, whether or not he was a Police Officer, he would of course say no? A. Positively he would deny it.

Q. And, the purpose is not true of the training and the activity of the officer who's doing the job would be to let the other person believe that the officer may be interested in the kind of thing that that person is into. Is that correct? A. Well, not necessarily so. The purpose of the training is to — is so that if he's approached and if evidence presents itself that he knows how to gather it and how to record it and how to present it to the Courts and we always tell them

[R77]

it's a decision of the Court whether a man is guilty or innocent, but the arrest factor is explained to them of what is required as far as conversation or an act is required before he can make an arrest.

Q. Finally, Captain, you referred to a lot of complaints you've had over the years. Have you kept any records of those complaints? A. Yes. There's numerous complaints and records in the Buffalo Police Department Vice Squad Complaint file.

Q. And those are complaints apart from the type of information that's filed in a particular prosecution. Is that correct? A. Yes. Those are regular complaints from citizens. In other words, if a citizen will call in the office or someone will make a complaint there will be a card made on it or else a written notation [sic] and it will be filed in the complaint file.

Q. Now, suppose you get that kind of complaint over the telephone, do you take the individual's name who's calling?

A. If he will give his name, yes, sir.

Q. Do you ultimately go out and investigate it or do you put that away in your reference file?

[R78]

A. No. When we receive a complaint it's generally placed where the men will be going on the street, where the Lieutenants and the street men will see the complaint and then they will work on that if they are in that area or they don't have other complaints to work on. Depending on the nature of the complaint, they will generally have that discretion where they work on it, you know, as they go out; in other words, they might take five, six, ten complaints with them on any given night and go out and work on them.

Q. And, you also get some complaints from people who won't give their names over the phone? A. Yes, sir. Many of them.

Q. Would you say over half of the complaints you get are by anonymous callers? A. I would say more than half. Most of the people say, I don't want to get involved in this, I don't want to give my name, or if they do they say they will give their name but they don't want to be involved in it. They will tell you it's a bad condition and they would like to see some police response.

Q. Would you say it's fair to say that less than one out of four will give their name on these complaints, complaints over the phone?

[R79]

A. I'd say a little more than.

Q. Somewhere between twenty-five percent and fifty percent would give their names? A. I would say yes.

MR. GARDNER: That's all.

MR. LOKKEN: No further questions.

BY THE COURT:

Q. Captain, these complaints you've talked about, are they recent complaints? A. Some of them are, Your Honor, some of them are within I'd say the last six months. They have been at various times but I'd say many of them are within the last year.

Q. Do they relate to the area that's involved in this case which I gather is on North between Delaware and Elmwood? A. Yes. Definitely, Your Honor.

Q. And, they deal with the activities of alleged homosexuals soliciting others? A. Yes.

THE COURT: Nothing else, thank you.

MR. LOKKEN: The People call Mr. McCarthy to the stand.

[R80]

TIMOTHY A. MCCARTHY, 64 Irving Place, Buffalo, New York, having been called and sworn as a witness on behalf of the People, was examined and testified as follows:

DIRECT EXAMINATION BY MR. LOKKEN:

Q. Mr. McCarthy, were you served with a subpoena to testify here this afternoon? A. I was.

Q. Sir, you've indicated your address was 64 Irving Place? A. That's correct.

Q. Does Irving Place — how is that related to the vicinity of Delaware and North Street in the City of Buffalo? A. Irving Place is a one way street from North Allen — the first street west of Delaware Avenue.

Q. You live at 64. How far is that from North Street? A. I'd say approximately two hundred fifty feet.

Q. Now, you've heard the testimony of Captain Kennedy, can you relate as a resident of that area any observations you might have about problems of loitering in the vicinity of North and Irving?

MR. GARDNER: I'm going to object to the form of the question.

[R81]

I think it should be more narrow.

THE COURT: More descriptive, sustained.

BY MR. LOKKEN:

Q. Mr. McCarthy, have you noticed any people who may have appeared to be homosexuals loitering in the vicinity of North and Irving? A. I can answer that by saying that since I've lived there I've seen gatherings of young males, I do not know their purposes specifically since I've never encountered them in conversation but I'd say generally there's two concentrations that I'm aware of by my living in that area, primarily on North Street near Delaware and on North Street at the corner of Irving Place and down Irving Place.

Q. What sort of activities have taken place there amongst these groups of people that you've noticed?

MR. GARDNER: I'll object for the same reason; I don't want an invitation to speech, I'd like a question which is directed to some definable area rather than an open ended question.

THE COURT: Are you questioning about the groups he's describing?

MR. LOKKEN: Yes, Your Honor.

[R82]

THE COURT: Overruled. Go on.

THE WITNESS: They stand and watch the cars go by primarily.

BY MR. LOKKEN:

Q. Do you notice any contract between them and passers-by? A. I have observed conversations between these individuals who may in fact stand in the approximate locations I've described before and drivers of automobiles.

Q. Have there been occasions when these people have entered the automobiles? A. I've not observed that.

Q. During what hours do these people gather? A. I would say from the time it begins to become dark, from dusk, until latest I've observed them would be 2:00 o'clock [sic], 2:30, 3:00 o'clock, possibly.

Q. Do you notice a lot of passers-by in that area at that time outside of those congregating? A. I would say there's a great deal of motor traffic on our street during those hours.

Q. What about pedestrians? A. There seems to be some migration of these individuals down the street, down Irving Place from the approximate location I've described before.



[R83]

Q. Basically those congregating or other people just passing by? A. There's a certain amount of congregation, generally it's a quiet street. But during the summer months there is a noticeable increase of automobile traffic, there's automobile traffic late at night, idling automobiles on the street, as well as through traffic.

Q. As a resident of Irving Place are you at all apprehensive about you or your family walking down the street at the times when these people may be congregating?

MR. GARDNER: Objection. Irrelevant, leading.

THE COURT: Do you want to be more precise.

MR. GARDNER: Well, he's asking him if he's apprehensive about living in the neighborhood apart from my general objection as irrelevant to the motion.

THE COURT: I understand.

MR. GARDNER: It seems it's a leading question and I don't think it's relevant to even the testimony the witness has given. It's one thing to ask this witness to describe what he sees, it's another thing to ask a witness to describe what he feels inside himself, that goes into the mental make-up of the witness which I can't possibly

[R84]

cross examine. How do you feel, what do you think at the time, things of that sort are not normally admissible.

THE COURT: Sustained.

MR. LOKKEN: Well, Your Honor, part of the People's argument is that the sort of congregating prohibits the free flow of traffic in the area.

THE COURT: Ask if he goes out during those hours.

BY MR. LOKKEN:

Q. Do you go out during those hours, Mr. McCarthy? A. Occasionally.

Q. Does your family? A. Yes.

Q. Do they pass by these groups? A. Yes.

Q. And have you had any encounters with them? A. I've not conversed with them.

Q. What kind of encounters other than that have you had? A. Primarily passing location where they congregate.

Q. Have they addressed you in any form? A. Not that I'm aware of.

Q. Has anybody in your neighborhood described to you any kinds

[R85]

of problems they may have had? A. Primarily the conversations.

MR. GARDNER: Objection. I think it calls for a yes or no and I will object on the basis of hearsay to any relations.

THE COURT: Yes or no?

THE WITNESS: Yes.

MR. LOKKEN: And you can generalize what sort of complaints they may have voiced to you?

MR. GARDNER: I'll object on the basis of hearsay, Your Honor.

THE COURT: Sustained.

MR. LOKKEN: Nothing further.

THE COURT: Mr. Gardner?

## CROSS EXAMINATION BY MR. GARDNER:

Q. On these occasions, Mr. McCarthy, when you have gone out have — and these people have been on the street, have they impeded your ability to come and go as you wished? A. Physically impeded?

Q. In any way you want to describe it? A. I would say impeded from my reluctance to go out, psychologically.

[R86]

Q. Well, before we get to that, when you have gone out and you've walked up and down the street, have you ever had any problem going past these people, going from where you wanted to go; have you ever been annoyed, harassed, by them in any way? A. No. Not overtly.

Q. Have you covertly been annoyed, harassed in some way? A. Well, I can respond that I haven't been physically intimidated as opposed to feeling some apprehension.

Q. Is it fair to say to the extent that there has been any inconvenience occasioned by these people being on the streets, it has been something which you have perceived as a result of your own instant thought rather than something that you have overtly done? A. No. I think the vehicle traffic, the idling automobiles on the street late at night, the ability to hear conversations going on outside the house, that has been an inconvenience.

Q. But you said that you have been apprehensive and you were psychologically inconvenienced, has anything been done to do this or is this a relation of your own feelings has anything been done by them to occasion this or is this your reaction to their presence?

[R87]

A. No. It's my reaction to walking by six or seven fellows congregating on the street corner.

Q. Now, Irving Place runs, as I recall, between North Street on the north end of the street and Allen on the south?  
A. That's correct.

Q. And that's a one block street. Is that correct? A. That's correct.

Q. And Allen Street — and this is in the area between Delaware and Elmwood? A. That's correct.

Q. And Allen Street of course, if [sic] part of what we think of as Allentown? A. I believe it's referred to that way.

Q. Is it fair to say that in the summertime the entire area of Allentown is somewhat more active in terms of people being on the streets and present at night then would be the case in the winter, fall and spring? A. I think that's a fair description.

Q. Is it also fair to say, sir, that Allentown in comparison with most other areas of the city, as a matter of fact, is somewhat more populated with people on the street and with bars and restaurants and night life activity than various other parts of the city?

[R88]

A. Maybe some parts of Allentown are but I wouldn't say where we are.

Q. I'm not talking about Irving, per se, but take Allen Street at the foot of Irving, for example; that's a fairly active area in the summertime at night, isn't it? A. I suppose you could characterize it as such.

Q. Would it be fair to say that Allentown or the Allen Street area itself particularly is perhaps Buffalo's version of Greenwich Village in the summertime in terms of sociological activities?

MR. LOKKEN: I'll object to the grossness of that generalization he's called an answer for.

THE COURT: Overruled. Can you answer?

THE WITNESS: I've been to Greenwich Village, I assume it might be something like Allentown.

BY MR. GARDNER:

Q. You would consider particularly in the warmer months Allentown to be a fairly wide area of the city in terms of street activity. Isn't that right? A. I would say Allen Street.

Q. And the people on Allen Street that contribute to the aliveness aspect that you and I are talking about encompass

[R89]

a lot more people than either prostitutes or homosexuals, as far as you can see. Is that correct? A. Being a resident, I would assume so.

Q. So when you refer to Irving Street as a generally quiet street, you would have to qualify that by saying that it's very close to Allen Street which is a fairly non-quiet street. Isn't that correct? A. Irving Place is quiet primarily because it's directed toward Allen Street but I believe there's more activity down Elmwood into Allen and down Wadsworth into Allen then there is down Irving to Allen because Irving is so close to the end of Irving from Delaware. From my living there it's quiet and that it has much less traffic than any other street that would flow into Allen Street. And, any spin-off or migration of activity from Allen Street I think is retarded by the fact that Irving goes the other way.

Q. It's a one way street? A. Going towards Allen so we get very little traffic, even pedestrian traffic from Allen towards North.

Q. If you had either vehicle pedestrian traffic who were involved in the night-life or live activity of Allen Street and were going to Allen Street, it would not be unusual that they might take a one way street down Irving to get to Allen



[R90]

which is right at the foot of the street? A. No, I'm sure that must happen.

MR. GARDNER: Nothing further.

THE COURT: Anything else?

MR. LOKKEN: Nothing further.

BY THE COURT:

Q. Mr. McCarthy, are there women with these men? A. Not that I've observed.

Q. No women? A. No, sir.

Q. Are these teen gangs or youthful gangs? A. On some occasions their presence seems to be solitary, they may be standing there alone, there may be three of them standing together, there is a bench on North Street very close to Delaware where there's generally a congregation of more than one. At the corner of Irving and North Street that generally is solitary individuals standing there, possibly twenty feet apart or so but there are no women.

Q. What age are these people? A. I would say from seventeen to thirty.

Q. They're not school kids hanging out on a corner, in other

[R91]

words? A. I don't really know, I can't characterize their age necessarily.

Q. Is this more on the weekend or more on the week days?  
A. It's generally more on the weekend, I believe, and it's generally more than in the summer.

Q. Now, you're married, are you? A. I am.

Q. Do you have children? A. No.



Q. Are there other families in the neighborhood on your block? A. There are a number of young families on the block with children.

Q. Well, you stated you were reluctant to go out. Why? A. There seems to be during the summer, a lot of activity up at that corner. For instance, at Irving and North there's men who are dressed casually who I don't believe live in the area and there have been, that I'm aware of, incidents in the neighborhood, burglaries, and fires, that type of thing. So, there's just a normal apprehension when passing an individual that I don't remember or not familiar with by virtue of his living in the neighborhood or he may appear to be unusual in his appearances at large, or dressed in a

[R92]

manner you might consider to be unusual, but there's an apprehension. Nonetheless, I'm aware of a certain amount of violence, muggings, but that occurs to neighbors.

Q. Are there gay bars in the area? A. I don't know. I think there's one on Allen Street. Your Honor, I don't know the sexual preference of these people, I can only describe what I've seen. I don't know whether they're male prostitutes or homosexuals or whatever, I think it's well known that there are a number of homosexuals living in Allentown which are home owners and keep their property in good repair and they are not a nuisance or a bother to the other residents on the street.

Q. From your observations, you say there are groups of men hanging around at least the corner of North and Allen and North and Delaware and this occurs at night for some period of time, usually on weekends in the summer? A. Yes, sir.

THE COURT: Anything else?

MR. GARDNER: Yes. Just a couple questions.

## RE-CROSS EXAMINATION BY MR. GARDNER:

Q. The Court referred to the word "gangs". Is that a word you

[R93]

would use to describe these people you've referred to, Mr. McCarthy? A. No — I believe I'd use that word. I'd try to use a description, congregation I think.

Q. And would these be a congregation to your observation of people who might meet each other on the street and stop and talk and move on as opposed to people who came in a group and stayed in a group and left in a group or are there — A. I would not say — I would characterize the congregation as a casual meeting. There's a bench on North Street that I have sat on, that is the same bench that these congregations might use and cars have driven by that bench slowly and look at me and I've looked at them and I would not describe it as casual encounters. I've gone out and came back and an hour later the same people were on the bench and the same people were solitary figures at the end of the street, I would say by virtue of observing them at some time later in the evening that their presence there was not transient.

Q. But at the same time, Mr. McCarthy, I gather when you were sitting on that bench, if someone else came along and sat on that bench with you, Police Officers or others in the public who might interpret that the two of you were a congregation, a group, and the — both be homosexuals would

[R94]

probably be incorrect, is that fair to say? A. I think you're absolutely right, Mr. Gardner.

MR. GARDNER: Thank you.

THE COURT: Anything else?

MR. LOKKEN: No.

THE COURT: Will you wait a second while I take care of some other matters.

(WHEREUPON, COURT THEN STOOD IN RECESS.)

ROBERT FREUDENHEIM, 140 North Street, Hotel Lenox, Buffalo, New York, having been duly called and sworn as a witness on behalf of the People, was examined and testified as follows:

\* \* \*

DIRECT EXAMINATION BY MR. LOKKEN:

Q. Mr. Freudenheim, you have an interest in the Hotel Lenox? A. Yes. I do.

Q. That's located on North Street in the City of Buffalo, is it not?

[R95]

A. Yes.

Q. Between Delaware and Elmwood? A. Yes. Specifically between Delaware —

Q. And Irving? A. — and Irving.

Q. Are you active at all in managing or overseeing this establishment? A. I am the owner of the hotel and I have a general manager that manages the hotel for me. I visit it two to three times a week.

Q. Have you as the owner received any complaints about any kind of loitering in that vicinity of 140 North Street?

A. I've received no specific complaints but innuendo, rumor, my own observations tell me that it is going on.

Q. What have been your observations? A. I have a tendency of visiting the hotel, since I have other means of employment

during the day, at night generally between 8:00 and 12:00 and I have seen groups of young men on both corners; the corner of Delaware and North, specifically near a couple of benches on the corner of Delaware and North and on the corner of Irving and North, generally a few feet down Irving.

Q. And what has been the behavior of these groups, if you can

[R96]

generalize them? A. They generally just stand there for periods of time.

Q. Have you seen them in contact with any passers-by, either in automobiles or pedestrians? A. Only one time I had occasion to mow the lawn on Irving, as a matter of fact, and there were — I was mowing the lawn, perhaps, thirty, forty, fifty feet down Irving and I received a complaint from an Irving resident as a matter of fact, so I took my lawn mower and did my own thing. So, at that time I noticed one or two people loitering and several cars stopping.

Q. And was there conversation? A. Conversation took place I believe, the cars went on after that.

Q. And was that the only instance of contact between the groups? A. Yes, that I can think of. Yes.

Q. Have you as owner of the hotel received complaints from any of your tenants? A. Not specifically. I've been talked to by my desk clerks and general manager has spoken to me. We have talked at one — we have an outside guard that constantly patrols the area, however, he does not go on the streets. Just patrols the hotel, it's [sic] parking lots and its two entrances

[R97]

and egresses and all that.

Q. What's been the nature of their comments? A. Just that was I aware that it seems to be — the momentum seems to be growing that young male adults seem to be gathering in both corners.

Q. Are there ever any women in those groups? A. No.

Q. Have any of the people who have reported to you on these incidents, have they mentioned anything else? A. No.

Q. How many people compose a group? A. I don't believe I've ever seen more than three or four. Generally two.

Q. How long are they there? A. Well, my check-ups or inspections of the hotel which again I do at night generally take an hour, I do a routine check and check the restaurants for cleanliness and things like that and I would say I'm in the hotel for a bit over an hour.

Q. Do you observe a group perhaps outside the hotel when you enter the hotel? A. I have frequently seen the same people there entering and when I go out, as when I leave.

[R98]

Q. And that may be for an hour? A. Yes.

Q. Have you noticed any encounters between pedestrians and these people? A. No.

MR. LOKKEN: No further questions.

CROSS EXAMINATION BY MR. GARDNER:

Q. Over what span of time, Mr. Freudenheim, would you say you've made these observations? A. I've owned the hotel



for just short of three years and although I used to be a resident of the area and I do drive down North Street on my way home, I live on the Westside and it seems to be getting quite worse. There seems to be more groups and, of course, the better the weather, the more the people, the more frequent the groups or the more I notice it full.

Q. In any event, you observed these kinds of groups over the last three years. Is that correct? A. Yes. I would say more so over the past year have I become aware of them.

Q. And would you say that part of the reason you've become

[R99]

aware of it more so, in the past year, has been that there's been discussion about it by you and your general manager? A. That's correct.

Q. And you've had this complaint by someone on Irving Street and you've paid more attention since you had that? A. I had a complaint about my lawn which prompted me to cut my grass. I've been sensitive to it because of conversations and obviously when you see groups of young males gathering there it's certainly a lot different than if it was a man and a woman. My residence is near some bars and you see a lot of young adults, male and female adults, it seems to be more male adults in that particular section.

Q. Let me ask you this. Has it been your observation that generally at that hour of the night these groups of people are reasonably quiet? A. Yes.

Q. So they haven't been out there throwing beer bottles or raising loud ruckus, noise? A. No, to the best of my knowledge when I'm on the premises.

Q. But you've been there three to four times a week over the last three years? A. Yes. Just short of three years.

Q. Is it fair to say that you would consider these gatherings



[R100]

of young males to be undesirable for your neighborhood?  
A. Yes.

Q. Is it also fair to say you would consider it less undesirable if they were groups of males and females, mixed groups?  
A. Yes. It would be.

Q. And would you explain to the Court why you would consider it less undesirable if you had males and females rather than just having males alone? A. I would be delighted. I suspect males and females — couples, if you will, wouldn't loiter on the corner of Delaware and North or North and Irving, especially for any length of time. There would be no reason to unless they were saying bye to each other, it's not — it's a residential district. Interesting enough, there's a lot more of elderly people living at the Lenox, the Ambassador, some of the houses around there, so these situations occur infrequently.

Q. In any event, I gather that you do not object to the fact that there are people on the street as such? A. That's correct.

Q. In fact, the presence of people on the street at late hours of the night may in fact make it safer to walk the streets because there will be people to observe when someone tries

[R101]

some criminal activity? A. I'm not quite sure I agree with that, not the young adults that I observe in that neighborhood.

Q. I understand. Let's get away from those young adults for the moment. A. Okay.

Q. If, for example, you had middle-aged couples composed of men and women walking up and down the street enjoying the night-time air, you would not consider that detrimental to the neighborhood? A. That's correct.

Q. And in that kind of situation as a matter of fact, those people on the street might make it a little more comfortable for you, elderly tenants to go out on the street and go to the corner?  
A. That's a fair statement.

Q. In a choice, you would certainly rather have the streets used by respectable people in those hours of the night rather than having the streets empty and desolate so that if your tenants had to walk to the corner they would have to take their chances on what might happen? A. If they were as you described, middle or elderly aged couples you are correct.

[R102]

Q. Therefore, sir, is it fair to say that the nature of your concern — is it fair to say the nature of your concern that people who are making the street populated at that hour of the night are, number one, young males — A. Correct.

Q. — and number two, are as far as you know and believe, homosexuals? A. I suspect they are that.

Q. That's one of the factors? A. I'm sorry?

Q. That's one of the factors in your mind that makes them undesirable. Is that correct? A. That's correct.

Q. Have you ever observed in your observations of the street, any of these groups of people engaging in violent activities A. None.

Q. Have you ever observed any of these groups of people pressing themselves or imposing themselves on passers-by who apparently did not want to talk to them? A. No.

Q. When you have observed conversations and you mentioned on one occasion on Irving Street where one of these people would talk to someone in a car that would stop temporarily,

[R103]

the conversation was quiet and privately between the two people? A. That's correct. I was ten or fifteen feet away, I could not hear anything.

Q. And when the pedestrian participated in that conversation, they then stood up and walked away and the car drove on? A. That was the end.

Q. There was no problem at all? A. That's correct.

Q. You say you've had no specific complaints from the residents of the hotel about this situation? A. Not to me personally.

Q. Well, have you had reports and I'll violate my rules a little bit on hearsay, have you had reports from your general manager about complaints he's received? A. I would have to answer that I believe so. I believe that's what prompted his conversation with me.

Q. Well, did he tell you he had received any complaints? A. I don't remember that specifically. I don't remember that.

Q. So, as far as you know, his conversation with you may have been prompted by his own observations. Is that correct? A. By his own observations because he lives in the hotel or by complaints he may have received.

[R104]

Q. Or perhaps by something that the outside guard mentioned? A. Or the other sixty or seventy employees.

Q. We simply don't know, is that a fair statement? A. That's correct.

MR. GARDNER: Thank you very much. Nothing further.

MR. LOKKEN: Nothing further.

THE COURT: Let me ask a few questions.

BY THE COURT:

Q. Whatever the situation is, it hasn't affected your business? A. I hope it hasn't, I don't know that. I don't know that.

Q. You're still fully occupied? A. The occupancy is very high, it's not full.

Q. But it hasn't changed? A. No.

Q. Not substantially over a period of time in the last three years? It has remained pretty steady? A. Yes.

Q. So other than the fact that you find these people distasteful and you don't like them around, they're not affecting your business or anybody else's business? A. To the best of my knowledge, they are not. I would have to

[R105]

question whether my middle-aged to elderly tenants want to walk to Howard Johnson's or to Allen Street or whatever and be faced with young men. Again, I have to question that.

Q. So you're really dealing with attitudes and nothing that you can really put your finger on about them being violent? A. That's correct.

THE COURT: Anything else?

MR. LOKKEN: Just one or two other questions.

RE-DIRECT EXAMINATION BY MR. LOKKEN:

Q. Mr. Freudenheim, are any of your apartments rented to people with families? A. No. Just couples.

Q. Were you to rent them to couples with children, would you advise them of the situation on North Street that we

discussed here? A. Being a business man — well, first of all, I have nothing to do with the operation of the hotel, I would question whether that is mentioned. I'm not sure we even have families other than our transient business where we have many families that stay one or two nights. I'm not aware of any permanent families even applying there.

[R106]

Q. Do you expect that perhaps were you to engage in perhaps renting rooms to families with children, that this — the situation on North Street might affect that? A. I guess I'd have to use the words it could.

MR. LOKKEN: Nothing further.

THE COURT: Thank you.

MR. GARDNER: Nothing further.

COUNCILMAN WILLIAM MARCY, residing at 90 Dana Road, Buffalo, New York, having been duly called and sworn as a witness on behalf of the People, was examined and testified as follows:

DIRECT EXAMINATION BY MR. LOKKEN:

Q. Sir, you're a member of the Common Council of the City of Buffalo, are you not? A. Yes. I am.

Q. And what are the bounds of your district? A. It's a very large district, it starts at —

Q. Rather than have you go through that, does it include the Allentown area? A. Yes.

[R107]

Q. Does it include North Street? A. Yes. It does.

Q. You've listened to this testimony? A. I've heard some of it, yes.



Q. Have you had — you or your office received any complaints about activities regarding loitering by people who are trying to engage in this kind of homosexual encounter? A. Yes.

Q. And could you describe the nature of these and where these specific areas — where these might be pointed to? A. You've been referring to North Street and the general complaints are North Street run between Delaware and Elmwood Avenue and they occur on the four corners; Delaware Irving Park and Elmwood. We get most of our complaints — most of our complaints have been during the warmer months, that doesn't mean to say that there not at other times of the year and they come at the rate of maybe two or three a week.

Q. And what are the natures of these complaints? A. Generally speaking it will happen after the fact. We'll get the complaint the next day from a constituent or somebody that's been in the neighborhood at some time or another and was either accosted or seemed to see what they

[R108]

considered obvious solicitation for whatever purpose, I assume the purpose of sex.

Q. Has there been activity of homosexual encounters as well as female prostitutes? A. Yes. In the case of North Street as opposed to complaints we get on Allen Street, North Street seems to be mostly homosexual activity.

Q. Could you generalize as to the type of encounters or the types of encounters that have been complained about? A. I'll try to generalize because each one seems to be a little bit different. For instance, the people at the bus corner on Delaware and North have been confronted by somebody of the same sex, generally male, as a matter of fact, all of these complaints are male homosexuals or they have been asked do you want to have a sex act, sexual act and these are usually people who live in the neighborhood or close to that corner; at the Lenox, Westbury,



Mayfair Lane. I think maybe I should continue and finish because the same problems go all the way down the street. As I said they're at all four corners of that block in that area between Elmwood and Delaware. And the other complaints are also in the nature of people who live there and see more than one person together — more than

[R109]

one person congregating, maybe two or three people of the same sex congregating at a corner and they've reported it to me or to my office that they consider this a somewhat frightening I guess is the wrong word to use, very unpleasant situation for them; and, of course, they always report it as taxpayers.

Q. Are most of the calls anonymous or do they leave their names? A. I know most of them — they generally leave their names.

Q. And as far as you can tell from these complaints, would it be fair to say that contact wasn't initiated at all by the complainant? A. To the best of my knowledge — you mean between the people on the street?

Q. Yes. A. No. Never.

Q. So in most of these cases, there has been an approach by the other party? A. Yes.

Q. For whatever reason? A. Yes.

Q. Have you yourself had any experience in the North Street area that may reflect on this?

[R110]

A. Well, my son goes to a tutor on Irving Place — as a matter of fact, she lives next door to Mr. McCarthy who was here previously — for math. And he's been doing this for a couple of years and looks like he'll be doing it for the conceivable future. At any rate, I pick him up generally in the afternoon

around 5:00 o'clock, 5:15, and one day I did go to pick my son up —

MR. GARDNER: I'm sorry?

THE WITNESS: I'm trying to explain the circumstances.

MR. GARDNER: I can't hear and I'd like to be able to make a timely objection so I would ask that the witness speak more slowly and clearer.

THE WITNESS: My son was going to a tutor, I went to pick him up at 5:00 o'clock in the afternoon, it may have been a few minutes earlier. Parking is difficult on Irving Street, it's a narrow street so I parked closer to North Street waiting for him to come from the tutor's house. I was in my car and I was approached by another young male who came to the car and asked me if I would like to engage in sex with him and I asked him to go away and leave the neighborhood. He swore at me and left, went back to North Street and

[R111]

disappeared around the corner.

BY MR. LOKKEN:

Q. He was in an automobile? A. No. He was walking, I was in my car.

Q. Were there any other young males there? A. No. He was alone.

Q. What did you do when you have these complaints, do you report them to any police officials? A. Yes, I do. I report them directly to Commissioner Cunningham, occasionally I point them out to Captain Kennedy.

Q. Has the frequency of the complaints varied with the seasons? A. Yes.

Q. And if you're able to tell, have they varied over the course of the last few years? A. I've been councilman for almost four

years and it tends to come and go. I can't say. For instance, last year we didn't have quite as a heavy a problem with prostitution as we seem to have in the past three or four months. Then, again, two years ago we had a large problem and it was in a different area then you're talking

[R112]

about but it was still a prostitution problem.

Q. To clarify matters a bit, the complaints that have been directed to your office, have they involved offers for we'll say deviate sexual relations, have they been complaints regarding offers for money or not for money or a combination of both. What I'm trying to say, has there been prostitution involved in the homosexual encounters? A. Oh, indeed. I can't say every complaint has mentioned that they would ask for money to do sex with somebody or something like that.

Q. But it was part of both? A. Yes.

MR. LOKKEN: Nothing further.

THE COURT: Mr. Gardner?

CROSS EXAMINATION BY MR. GARDNER:

Q. With regards to the complaints you received from people who have been approached, councilman, as part of those I gather they indicated some money connection with the conversation. Is that correct? A. In most cases, yes, that is reported directly to me.

Q. How many of these complaints would you say you've received

[R113]

in the last year relating now to the North Street area for the moment? A. I'm going to say twenty, I would think, over a period of a year. I can't say for a year because it drops down,

say, the first of November you won't get that many complaints. So, since the snow left, since the first of April, maybe fifteen to twenty.

Q. And of those fifteen to twenty, how many times did a person complain to you specifically that there was money in the conversation? A. Well number one, Mr. Gardner, I don't take all the calls directly. When I do talk to them and I would say I've personally discussed this with maybe six or seven people, they've all said it was for money.

Q. And those were all situations where they had been approached directly? A. That's correct.

Q. Now, taking the situation where you've received complaints by people who have merely observed people on the street, is it fair to say that they were not in a position to know whether or not there was money involved in the situation? A. That's fair.

THE COURT: We'll take a brief break.

[R114]

(WHEREUPON, COURT THEN STOOD IN RECESS.)

THE COURT: Yes, Mr. Gardner.

BY MR. GARDNER:

Q. Mr. Marcy, on the incident when you were approached, was there any mention of money at that time? A. Yes. There was.

Q. And what was said by the young man with regard to that that you were talking to? A. Do I have to repeat the exact words?

THE COURT: Do you want the vernacular?

MR. GARDNER: No. What did he say about the money specifically?

THE WITNESS: He said for \$10.00 he would perform a certain act.

BY MR. GARDNER:

Q. In other words, he offered to do something for \$10.00?

A. That's correct.

Q. Now, you have had occasion to be acquainted with homosexuals in the course of your career or your lifetime, Mr. Marcy? A. To know them?

[R115]

Q. Yes, as people? A. Certainly.

Q. And you're not suggesting in your testimony that all of the activity of homosexuals on the street talking to each other is necessarily prostitution? A. Good heavens, no.

Q. I just wanted to be clear on that.

MR. GARDNER: I have no further questions.

THE COURT: Mr. Lokken?

MR. LOKKEN: No further questions.

BY THE COURT:

Q. From what I've heard you're the only one to testify that you were affected and you don't live in the area. You live on Dana which is not directly in the area? A. It's a long ways away. I think perhaps the occasion was that I was sitting in the car waiting for my son.

Q. When Mr. Gardner mentioned the fact that you've had occasion to know homosexuals in your life, you don't claim — I gather you're not here subpoenaed but you're here because you're interested in your prosecution as a witness?

[R116]

A. Yes, sir.



Q. Do you claim that this sort of street life is necessary for a homosexual to carry on his own life; in other words, this kind of street encounters are a necessary part of a homosexual's life?

A. Prostitution — and I assume prostitution means there's being exchanged for certain acts, whether it's female or male prostitution, I don't think is important at that point. Business men who operate what we normally think of as a normal business, a store, they have to live within a certain boundary of the Zoning Laws and the Business Laws and one thing or another and these people do not. I don't think that it is necessary for a homosexual to have to go and sell his body or a female prostitute to sell her body in order to make a living.

Q. Or to go to one who is selling? A. That's correct. Or to go to one who is selling. I think it's an obnoxious situation and I'm not being facetious, I say it all the time, it may sound that way.

Q. If you were to legalize prostitution, male and/or female in the special zoning that's created on Elmwood Avenue, for instance, on Allen Street, you could prosecute these people under the Zoning Law because they would be

[R117]

specifically either prohibited from doing this or it would not be included in the Special Zoning District. Does that make some sense to you? A. I undersand what you're saying.

Q. I gather some of your complaints is [sic] that these people were soliciting one another or soliciting complainants who would call you? A. Yes. I would assume that's the case.

Q. Without asking for money or without offering to do it for money? A. I think the idea is that money was implicit, but whether it was mentioned or not, I couldn't say in every instance.

Q. So your complainants are sort of tied up with the idea of male prostitution? A. That's correct.



THE COURT: Perhaps you want to ask questions on that, Mr. Gardner?

MR. GARDNER: I do.

RE-CROSS EXAMINATION BY MR. GARDNER:

Q. Have you ever been occasioned to read any authoritative

[R118]

books or anything on sociology or any other aspects of homosexuality?

MR. LOKKEN: I'll object to this.

THE COURT: Overruled.

THE WITNESS: I don't know what you mean by authoritative books. I read extensively, I suppose whether I've read authoritative books, I don't know, I may have in college.

BY MR. GARDNER:

Q. Have you? A. Medical books.

Q. Have you read anything on the subject of homosexuals and how they interact with each other socially or otherwise?

A. Most of it has been in novel form.

Q. The complaints you've received, you just testified, you thought implicitly involved the subject of money. Would you agree that it's unlikely that if a homosexual was on the street and met another homosexual it's unlikely that either one of them would call you to make a complaint? A. Obviously they would not.

Q. And you made a fairly strong statement, I thought, that it ought not to be necessary for these people to engage in

[R119]

these situations on the street for money. Do you know what one gay person does to learn who is another gay person or to meet him, are there any places in your district, to your knowledge, where that can occur other than on the street? A. I'm told there are certain gay bars, restaurants, taverns, what have you in my district.

Q. Is it your opinion or feeling that if there are homosexuals in your district, if they went to meet each other they should go to gay bars or these types of establishments as opposed to encountering each other in some public place other than gay bars? A. I think it would be more equitable of a situation for the residents and the business men of the area, yes.

Q. Were you here when Mr. Fruedenheim testified, correct?  
A. Yes. Well, for part of it.

Q. I asked him at that time if Allentown was a fairly active area in the summer months with people out on the street walking and talking to each other. Is that your observation of Allentown, generally? A. I think that's true.

Q. And you have no objection to the fact that there are people who find it safe to use the streets in Allentown at night

[R120]

without fear, if that's the case, let me rephrase my question. You have no objection, do you, sir, to the fact that there are people out on the street in Allentown in the warmer months?  
A. Good heavens, no.

Q. Would it be fair to say that you would think it better for the neighborhood if the homosexuals would go somewhere else? A. You're using a very strong term.

Q. Homosexuals? A. You're using general terms.

THE COURT: Just a moment. You're talking about the streets?

THE WITNESS: I'm talking of prostitutes. I'm not talking about homosexuals per se.

BY MR. GARDNER:

Q. This case, as far as I know, is not about prostitutes and that's what I'm getting to. Your testimony, is it fair to say, sir, is related to problems regarding prostitutes? A. That's correct.

Q. And you're not giving any opinion or expressing any finding with regard to complaints about homosexuals who are not

[R121]

engaged in prostitution but merely want to meet each other?

A. That's not the subject here and I have no [sic] and I certainly did not intend to give any such testimony.

MR. GARDNER: Thank you very much.

THE COURT: Anything else?

RE-DIRECT EXAMINATION BY MR. LOKKEN:

Q. Sir, that encounter that you have described with a person who offered sex for a fee — A. Yes.

Q. — would you have been less offended if it had been an offer to do it for nothing? A. No. I would have just been offended.

MR. LOKKEN: Thank you.

RE-CROSS EXAMINATION BY MR. GARDNER:

Q. Sir, if your wife had been approached by the same gentleman as she was waiting for your son, and had been asked if she would like to engage in sex without a fee, would she have been equally offended so far as you know? A. I think she would have been, yes.

[R122]

THE COURT: Okay, that's it.

(WHEREUPON, A BRIEF RECESS WAS THEN TAKEN.)

KENNETH BURGSTAHLER, 74 Franklin Street, Buffalo, New York, having been duly called and sworn as a witness on behalf of the People, was examined and testified as follows:

DIRECT EXAMINATION BY MR. LOKKEN:

Q. Officer, how long have you been employed by the Buffalo Police Department? A. About fifteen and a half years.

Q. What is your current assignment? A. I'm assigned to the Vice Squad.

Q. How long have you been there? A. About fifteen years.

Q. Have you had occasion to make arrests for loitering for the purpose of engaging in deviate sexual activity before? A. Yes. I have.

Q. And have you had any idea how many such arrests you may have made?

[R123]

A. Well, I don't have any specific numbers but I've made quite a few.

Q. Do you, yourself, often receive complaints about such activities? A. Well, if we happen to be in the office at the time and somebody calls in, yes, otherwise whoever is in the office, the desk man, whoever is there will take the complaint and enter it in our complaint log and whoever comes in when working nights or days will read this over and see what complaints have been received and what we'll work on.

Q. So, if you've received some complaints to respond to a particular area where the complaints have been issued from you will respond? A. Yes.

Q. Can you describe in general terms the nature of your encounters on the street with people whom you've arrested for this crime? A. For the loitering?

Q. Yes. A. Well mainly we use them a lot to arrest homosexuals, homosexual persons who have committed deviate acts with no fee involved. Recently we have used it with a male

[R124]

and female for prostitution.

Q. If you can generalize, officer, do these arrests occur — are there other people around outside of you and the person who you eventually take into custody; in other words, do these kinds of encounters often take place in groups of people or where there are people mulling about or relatively a solitary isolated kind of happenstance? A. Well, usually the arrest will take place with just two people; the officer and another party, but I'm not saying that there are not other people in the areas where we are.

Q. Have you seen people who you've arrested or people who have been mulling about confront other people, other than yourself? A. Yes.

Q. Could you generalize as to what happens when these confrontations took place?

MR. GARDNER: I'm sorry, I'll object to the form of the question. I don't know what's meant by confrontations.

THE COURT: Sustained. What was the question again?

BY MR. LOKKEN:

[R125]

Q. What are the natures of the encounters between you, the people you arrest and the people mulling about and other citizens walking by. Have you been able to tiplify [sic] those at all? A. Well, I can testify to what would go on between — if I had a conversation with somebody or one of the other officers I



work with had a conversation and there was an arrest and — but to say what went on between other parties in the area would be hard to say.

Q. Did you know that there is a lot of what you might call hanging around in the areas where you've received complaints, are there a lot of young males for example in the vicinity? A. Yes. There are.

Q. Are there other kinds of people, older people, young people, children, adults, families in that vicinity? A. Well, it depends on what area we're talking about.

Q. Are you familiar with the North Street area? A. Yes. Very familiar.

Q. At the end of Delaware? A. Yes.

Q. What kind of groups congregate there as far as you receiving complaints about loitering?

[R126]

A. Well, there's a lot of males hanging around on North Street and it varies in age from young to old. There are other people in this area that walk through the area, there is a hotel right around the corner, there's Howard Johnsons, there's a lot of people in this area.

Q. Do you see any interaction between these young groups of people hanging around and the other people you've mentioned? A. Well, I seen conversations. I've seen vehicles stop and talk to these people; one would get in, one would leave.

Q. Now, as far as your arrests go, who approaches whom? A. In our case the person arrested would approach the officer we try not to approach anybody, we are in the area but we try not to approach anybody.

Q. And are these conversations between yourself and these people, do they tend to be long and involved or rather abrupt?



A. It goes both ways. Sometimes they're long, sometimes they're very short, it just depends. Sometimes there's a conversation with no arrests, there's no talk of any type of sex and there might be no arrest.

Q. Are the inquiries for sex made initially or are they made somewhat after the conversation has developed?

[R127]

A. Usually after the conversation started.

Q. And how are the approaches made, is there a topic of conversation brought up or would you typify [sic] or generalize as to what kind of advances are made toward you? A. Well, they usually ask you if you want to engage in some type of sex.

Q. What might be the initial question? A. Well, they sort of say, hey, are you looking for a good time, what would you like to do. And then it goes back, what would you like to do, and then it usually comes out what they want to do and you usually agree and then you agree on some place to go and then the arrest is made.

Q. Do these arrests, the ones you've made, do they tend to be concentrated in a few areas or are they evenly disbursed? [sic] A. No. There are a few areas —

THE COURT: Could I interject. When you walk up to groups on North Street, do you try to walk through, what happens?

THE WITNESS: We're usually in the area.

THE COURT: Are you observing or what?

THE WITNESS: We're observing.

THE COURT: You're in a car?

THE WITNESS: No. Usually on foot — well, we drive through

[R128]

the area, yes. A lot of times on foot.

THE COURT: There's a Hotel Lenox and across the street there's a stone wall with a big vacant lot, that's where the house got knocked down?

THE WITNESS: That's right and they sit on that wall, they walk into the back lot, they hang on street corners so we either walk through the area and stay in them areas or we might be on the street corner.

THE COURT: When you walk through a group of people wherever they are, have you ever known yourself as you walked through these groups of people, that you're stopped?

THE WITNESS: I can't say I was stopped by a group of people, no.

THE COURT: So, in other words, you're walking through, you're about the same age more or less?

THE WITNESS: Well, some of them are younger.

THE COURT: And nobody stops you though usually you have to stop before there's any kind of talk?

THE WITNESS: Not necessarily. I'm talking about a group, they may not stop you in a group. If there's one or two they might say how are you.

[R129]

THE COURT: Well initiate it, does that happen also?

THE WITNESS: It happens quite a bit, yes.

THE COURT: Would you say it happens half the time, more of the time or less?

THE WITNESS: A little bit less than half.

THE COURT: Less than half. In the other — in other words, the majority of the time you have to initiate something, you have to stop?

THE WITNESS: Well, we're in the area —

THE COURT: But if you're walking through less than half the time does somebody say hello or something, is there anything you deem offensive?

THE WITNESS: Well, not myself, I'm —

THE COURT: I know, you've been through it. What was the worst they say or the typical thing if you're stopped?

THE WITNESS: They usually won't say anything right away.

THE COURT: Will it be hi?

THE WITNESS: Hi.

THE COURT: And an invitation but nothing offensive?

THE WITNESS: That's correct.

THE COURT: Very rarely do you get something obscene or anything like that.

[R130]

THE WITNESS: That's true.

THE COURT: Okay.

BY MR. LOKKEN:

Q. Officer, how long does it take to the end of the conversation before the subject of sexual activities is brought up?

A. It's hard to answer, it varies.

Q. Do you exchange two or three sentences generally or would it be a half hour's conversation? A. No. It's usually less than that. I'd say an average of maybe ten minutes.

THE COURT: That's the average, in other words, to talk with these fellows before anything happens is ten minutes?

THE WITNESS: Well, sometimes it's quick.

THE COURT: Quick?

THE WITNESS: Real quick and other times it's longer and it's hard to generalize how fast it happens.

BY THE COURT:

Q. Are these the guys that hang out on the corner?

[R131]

A. Delaware and North they usually hang out, yes.

Q. They go for the cars and the cars flow through there and they stop? A. Yes. They do.

Q. That's at this point when sometimes people are on foot and they go someplace? A. Yes.

Q. It happens? A. Yes. It does.

Q. Do you have — did you ever use a decoy or anything other, any other system to go after prostitutes as opposed to fellows? A. Yes. We do. We use private cars, unmarked cars and pull up there and get solicited that way.

Q. You do? A. Yes.

Q. So there is a way you go after prostitutes? A. Yes.

Q. So that is done? A. Yes.

Q. As opposed to what goes on, you also do this on Washington Street and areas like that? A. Yes. We do.

[R132]

Q. Would you characterize the activity in the Elm-Oak area more serious and more violent than North Street? A. Well, in terms of violence probably, yes.

Q. You've had murders down on Elm-Oak involving prostitutes, kids ripping off prostitutes, this sort of thing? A. Yes. We have.

Q. But have you ever had anything like that, the same kind of robbery, the same kind of intensity, violence, on North Street? A. I wouldn't say intensity but I wouldn't say it hasn't happened.

Q. But you do get complaints of robbery and violence? A. Yes.

Q. And this generally involves prostitutes? A. Usually, yes. Usually the younger type of homosexual will prostitute himself. An older one, they will want to meet somebody, usually.

Q. Have you found you can actually go after the prostitutes without affecting — in other words, do the prostitutes mingle with the other fellows? A. Yes. They do.

Q. So you don't know who's who? A. No. We don't.

[R133]

Q. So you will find young prostitutes on that same street corner along with fellows just out for a good time trying to meet another friend? A. Yes. We do.

Q. And you also try to arrest female prostitutes, correct? A. Yes.

Q. And you, yourself, do that? A. Yes.

Q. And you find there's quite an intensity, am I correct, on the violence attached to female prostitution? A. Well, I make a

lot more prostitution arrests than I have in loitering underneath loitering sex.

Q. Is there violence attached to prostitution or regular street crimes that you would expect occurring along with female prostitution. In other words, would female prostitutes also be very likely to commit street crimes from your experience, fifteen years or whatever it is? A. Yes. They would.

THE COURT: All right, that's all.

MR. LOKKEN: I don't have anything further.

THE COURT: Mr. Gardner — if I may. Are you aware of any kind of problems at the Front Park or LaSalle Park?

[R134]

THE WITNESS: Yes. I am.

THE COURT: This is dealing with homosexual activity?

THE WITNESS: That's true.

THE COURT: What sort of activities there?

THE WITNESS: Well it's mainly where two males will get together and have a conversation and usually right there some act is performed, it's usually in the bushes off the one side at LaSalle Park.

THE COURT: Do you get complaints about this?

THE WITNESS: Yes.

THE COURT: From who?

THE WITNESS: People in the area.

THE COURT: This is LaSalle Park?



THE WITNESS: LaSalle Park because there's a men's room on one side of the street and right across the street there's some bushes.

THE COURT: Describe the park?

THE WITNESS: Well, there's a U-shaped street —

THE COURT: Who's in the park other than homosexuals that you say are there?

THE WITNESS: Families, just about anybody, runners, ball players.

THE COURT: Do you have a little league there?

[R135]

THE WITNESS: I don't know to tell you the truth.

THE COURT: You don't know if there's baseball or football for kids?

THE WITNESS: Oh, wait. There is a football field off to one side, yes, there is for young people.

BY THE COURT:

Q. Do you customarily find families there? A. During summer, sure, a lot of people.

Q. When is there homosexual activity that you've seen or had complaints of, what time of the year? A. Well, in the summer months.

Q. Is this contemporaneous, does this happen at the same time that you have found families use it? A. Yes.

Q. Who complains of this? A. People in the park. See, in one area it's very desolate and dumped with garbage on one side, but if children get down in there they could see an act going on which isn't right and receive complaints that they are down in this area.

Q. In other words, some people, families, whoever, see them

[R136]

there? A. That's true.

Q. Do you know where the actual solicitation takes place?

A. Usually down in that area but I've also seen it in cars along the street on one side, not near the lake, on the other side.

Q. Is there an isolated area or are there people in the area?

A. In that area it's a little bit on the isolated side because it's over-grown with trees but there is [sic] all kinds of paths through there. It's not a clear area, not a motor area, it doesn't have any playground equipment or anything like that.

Q. So, you don't know if there's children in there or people there at all? A. If anybody wants to go down there, they can go down there.

THE COURT: All right, thank you. Mr. Gardner?

CROSS EXAMINATION BY MR. GARDNER:

Q. Officer, just on this last point, is there a time of day when that kind of activity in LaSalle Park takes place and I'm talking about homosexual activity, the open sex?

[R137]

A. I would say more in the afternoon.

Q. But in any event, we're talking about people who have decided to engage in sex in a public place, is that correct, in that instance? A. Yes.

Q. Have you been instructed that you have means to arrest those people for public lewdness in those situations? A. Well, I have never arrested anybody for public lewdness, usually solicitation would take place then and an arrest would be made in that area.

Q. I understand. But have you been advised and do you understand that there is a Public Lewdness Statute and if you

were to actually catch somebody in the act of sex you can arrest them under that statute? A. Yes. I'm aware of that.

Q. And, by the way, LaSalle Park, just for the record as to the geography, the LaSalle Park is near the Niagara River and it's well away from the area we've been referring to as Allentown area? A. That's correct.

Q. And His Honor referred to Elm-Oak area, am I stating that's an area of the city on the other side of Main Street from what we've been referring to as the Allentown

[R138]

area and removed some distance from the Allentown area? A. Yes. That's true.

Q. Now you were questioned with respect to the amount of time it takes on an average or in general before the subject of sex gets into the conversation. Do you recall that? A. Yes.

Q. Let me ask you, have you had experience in which you've been in a cruiser or an unmarked car cruising the street to see if you would be solicited and have you been solicited by male homosexuals for money, male prostitutes? A. I have been. I can't recall an instance in that area right now where I have been.

Q. Is it fair to say —

THE COURT: What area are we talking about?

MR. GARDNER: North Street.

THE WITNESS: North Street now.

BY MR. GARDNER:

Q. Is it fair to say, officer, that if you're a car and the car is approached by a male prostitute, the subject of getting into sex is going to come up very quickly? A. Yes. It usually does.

Q. As matter of fact, as a practical matter, it would be in

[R139]

first sentence, do you want to have sex for so much money, isn't that the case? A. That could be the case at times.

Q. Now, you also mentioned in your testimony however, and you referred to them as the older ones, generally that there were gay people or homosexual people on the street who were out looking for friends or looking for a good time who are not necessarily engaged in prostitution, is that correct? A. That's the way I feel about it, yes.

Q. Have you had occasion dealing with the people who you would — you think would fall under this category, you or an undercover officer? A. Yes.

Q. Can you tell the Court in those kinds of situations what the pattern is as to how long it tends to take before someone brings a subject of participating in sex up? A. (No response.)

Q. Is it longer or faster than it would be with prostitutes? A. Longer.

Q. Is it fair to say, officer, that if you're walking down North Street and you encountered an adult male who was looking for a friend to have some fun with and wanted that

[R140]

person to go back to his apartment with him, that a conversation would start with an innocuous conversation with hi, how are you, nice weather, that type of thing — A. That's true.

Q. And only if you stopped and engaged in that conversation for some period of time would the subject of possible engagement of sex be mentioned implicitly? A. Yes. That's usually what would take place.

Q. Now, in your job and the job your fellow officers undertake, is it true, sir, that you or your fellow officers would never be the first one to mention getting into actual sex with someone? A. That's true.

Q. And in fact, that, is it not, a standard procedure that you would follow, let the other guy mention sex for the first time. Isn't that right? A. That's right.

Q. And is it fair to say that before the other guy will mention sex for the first time there is liable to be a lot of conversation going on where he's feeling you out to see whether you might be interested in that and so on before he would actually take that big step, isn't that a fair statement?

[R141]

A. I suppose that's true.

Q. So if you walk up to such a person as this and they said, hi, how are you, and you said, I'm fine thank you, goodnight and you walked right on by, the subject of sex would never be brought up between the two of you, would it? A. With that type of person, no.

Q. So the only type of person where the subject of sex would be mentioned initially and before you had a chance to walk on by would be if you had an actual prostitute soliciting your business. Isn't that right? A. That's a true statement.

THE COURT: So you're only stopped by an actual prostitute, really?

THE WITNESS: Except in extraordinary circumstances. Most of the time if you're stopped by an actual prostitute —

BY MR. GARDNER:

Q. Stopped as the actual statement of sex? A. Yes. Right away, yes.

Q. And when you say you're stopped by other people, what you mean by that is they will initiate a conversation? A. Like, hello, how are you.



[R142]

Q. And you have the choice to stop and talk to them and say hi and walk on but they don't physically stop you? A. No. They don't.

Q. Now you mentioned in your testimony that by the time the subject of sex is mentioned implicitly after this process of feeling you out has taken place, it's just you and the other person alone at that point. Is that correct? A. That's usually the case.

Q. In any situation you've ever encountered where someone has suggested that you and he engage in a sex act and money was not involved, is that — has that invitation ever been given to you while there were other people in an immediate ear shot? A. Well, I've been in bars where it happened.

Q. Well, I'm going to get to the bars in a minute. Let's talk about the street for a moment. A. I can't remember any case where it may have happened.

THE COURT: I'm sorry, this is when money was not or was?

MR. GARDNER: Was not. When somebody was just looking for a friend to spend the night with or couple hours with and you were talking on the street; the invitation and the talk about sex would always occur when it was just you and him alone?

[R143]

THE WITNESS: Well, usually there were people in the area but I wouldn't say they could overhear you.

BY MR. GARDNER:

Q. Now, you mentioned that some time you were in bars. Is it part of your duties as a Vice Officer with respect to this statute to go to gay bars periodically? A. Well, not really with

regards to the statute. We would go on a complaint from the State Liquor Authority.

Q. For the State Liquor Authority? A. Yes. We'd go on a complaint that there's a disorderly premises, homosexual in the places — now I'm going back a few years because the way the laws have been changed, we don't usually investigate this type anymore because we don't get too many complaints anymore. What used to be a violation before the Liquor Authority is not anymore.

Q. Now, it's your understanding it's not a violation as far as the State Liquor Authority is concerned for gays to be in a gay bar? A. That's correct — well, the dancing and things are not violating [sic] anymore so we don't — we didn't investigate them as much as we used to.

Q. Do you and other officers of the Vice Squad still within

[R144]

the last two years occasionally go into gay bars dressed in civilian clothes? A. Yes. We do.

Q. What would cause you to do that, for what purpose generally? A. Well we would get a complaint that acts were taking place in this premises.

Q. Sex acts? A. That's true. Like in the men's room and we would go in there and we would just hang around to see what would happen.

Q. Would you ever go into a gay bar with or without a complaint just to see whether anybody would invite you home for sex? A. I haven't for the last four or five years but we have in the past, yes, we used to go into bars.

Q. But for the last four, five years you haven't? A. No.

Q. To your knowledge for the last two years has any other member of the Vice Squad gone into gay bars just to see if they

would be invited home for sex somewhere? A. I can't recall any arrests being made in bars within the last two years.

Q. Do you recall anybody going into bars to see whether that

[R145]

activity would take place? A. I can't recall. I would say we went in on complaints, I can remember one in particular.

Q. Were you involved in the arrest on this particular case, officer? A. I assisted the officer who made the arrest, yes, I did.

Q. There was no claim and there is no claim that there was any money involved in this particular case, is there? A. That's correct.

Q. Is it correct to state that in this particular case there was an extensive conversation that went on between the arresting officer and the assisting officer and the defendant before the subject of sex was actually mentioned? A. I believe so.

Q. And do you recall in this particular case at a time when a conversation was taking place involving the defendant and with the complaining officer present in civilian clothes in a small group of people, some uniformed officers came along and told them all to move along including the undercover officer himself? A. It wasn't a uniformed car but there was a car stopped, police car.

Q. And in fact, is it true that the police car we're talking

[R146]

about and the officer in that car were aware that one of the people they were shooting down the street was an undercover officer? A. I don't think that they made that determination until they stopped.

Q. Stopped what? A. Stopped in that area where this group of people were.

Q. But they made the determination before they told the group to move on. Is that correct? A. I believe when they stopped, they realized that one of them was an undercover officer. They told everybody to move and everybody did.

Q. Including the undercover officer? A. Yes.

MR. GARDNER: Nothing further, Your Honor.

BY THE COURT:

Q. Officer, how many people congregate generally, let's take in the summer on a weekend night on that street corner or a street corner in Allentown that you have reason to believe are homosexuals? A. I would say as many as fifteen, not on one corner.

[R147]

Q. Total? A. Total.

Q. Between, say, Delaware and Park, that's where most of the people are? A. Yes.

Q. That would be fifteen on an average? A. I would say at the most. And that would be anywhere between 10:00 and 3:00 in the morning and later I've seen them.

Q. Would you say every weekend night there's how many people on these corners? A. I wouldn't say every weekend night. During the summer this past year we've had quite a few people hanging around there but I've arrested in this area for over ten years.

Q. You have? A. Yes. I have.

Q. Do you find — do you have reason to believe there are more homosexuals there now or less than was some years ago? A. There seems more up on North Street.

Q. And on some weekend nights on those hours there's nobody there? A. As you get into the colder months, yes, but in the summertime it was pretty busy on the weekends.

[R148]

Q. What do you mean? A. I'd say I've seen fifteen, I've seen four or five.

Q. Would these people stay in a congregation or group or would they be sort of loosely distributed or would it vary?

A. It would vary. Like on Delaware and North there's usually four or five and they sit on that bench and hang around and then on both sides of the street there's people there and on Irving Street and Park Street, they hang on them corners.

Q. Are they in the residential areas down Irving and down Park or mainly on the corners? A. Well, now it's mainly on the corners, over the years it used to be all up and down Irving, but they changed that into a one way street which secured a lot of that problem.

Q. Are they [sic] gay bars in Allentown? A. There's one up on Elmwood.

Q. In the Allentown area? A. Yes. Between North and Allen.

Q. There's one in that area? A. Yes.

Q. Have you received complaints from people in the area or businesses of this sort of activity? A. I personally have not received any.

[R149]

Q. Do you know of any? A. From being in the office I read the complaints in the books, these are the ones you go out on.

Q. What are the complaints? A. We have gotten them from Councilman Marcy that is reported to our office.

Q. Who's talking about prostitution? A. Well, we've always got complaints of homosexuals in the area so we naturally investigate it.



Q. Do you ever have complaints of homosexuals tampering with children in the area? A. No. I've never received a complaint like that.

Q. Do you know, or have ever received a complaint or read a complaint of homosexuals, let's say, this past summer accosting somebody who will be walking on North Street or in that Allentown area? A. No. I haven't.

Q. By accosting, I mean stopping and propositioning them, this would be other than policemen, somebody as a civilian who would come back and complain to the Police Department? A. I can't recall anything specific but I think we've had a complaint like that.

Q. How many this past summer?

[R150]

A. We may have had a couple, I can't recall if I read it in the complaint book.

Q. Would it be more than a couple or less than a couple, to the best of your knowledge? A. Maybe two or three, that's what I can recall.

Q. Do you recall any complaints from people in the area that live there of people hanging out on corners that have been calling other than councilman Marcy? A. Nothing comes to mind right now but I'm not saying there isn't.

Q. Are there complaints of prostitution that from what I understand you answered two or three calls of people who were accosted, people walking through there and were propositioned, do you recall or ever received or read complaints of people who were propositioned, males propositioned by other males for propositioned? [sic] A. There was a complaint but I can't remember who it was. It was from some younger males being in this area that were out there, there was another male that's been arrested several times and he had

several young males out there prostituting and I can't remember who gave us that complaint, that's one that comes to mind.

THE COURT: I'm sorry, but I promised my stenographer she

[R151]

she could leave at 5:00 o'clock, it's 5:00 o'clock now so we'll recess at this point.

MR. GARDNER: That's fine, Your Honor. Are we through with this witness, I have a couple of questions of him so that he won't have to come back.

THE COURT: Go on.

MR. GARDNER: I'd like to ask one question. There are a couple of gay bars in the area on the corner of Main and Allen, is that correct?

THE WITNESS: Yes.

MR. GARDNER: And that would be the eastern end of Allentown area?

THE WITNESS: Yes. There are two.

MR. GARDNER: Nothing further.

THE COURT: Fine. Off the record.

(WHEREUPON, AN OFF THE RECORD  
DISCUSSION ENSUED.)

(SEPTEMBER 25th, 1981. SAME APPEARANCES  
AS NOTED.)

MR. LOKKEN: The People have concluded their proof I guess at the hearing. I don't believe Mr. Gardner has any more.

[R152]

MR. GARDNER: No. I have no intention to ask any more question or present any proof at the hearing, Your Honor.

THE COURT: Can we call the officer back for a couple of questions?

MR. GARDNER: Sure.

THE COURT: Unless you want to talk now. The other thing is do you want to have the arresting officer who is Nicosia here?

MR. LOKKEN: Yes.

MR. GARDNER: Does he want to hold the trial?

THE COURT: Do you want to hold the trial? Do you mind if I ask him questions during the trial that might relate to the hearing?

MR. LOKKEN: I have no objections.

MR. GARDNER: I have no objections.

THE COURT: All right, let's state now what you stated yesterday.

MR. GARDNER: Your Honor, in the responding papers that I've received, Mr. Lokken refers in his paragraph fourth, to the objection which is in paragraph two of my affidavit which goes to the question of the sufficiency of the information insofar as it uses the words "I'll blow you".

[R153]

There's no particular information that defines those words; however, having discussed it with the District Attorney further and my client and noting the District

Attorney asks Your Honor to take judicial notice of the colloquial meaning of those words, I offer the following stipulation. I offer to stipulate that it is the common and ordinary understood meaning of the words "I'll blow you", among lascivious adult males in the United States. That the speaker is proposing to engage in the sex act being addressed which includes physical contact meaning the speaker's mouth and the other person's penis, or, in other words, what's defined as Deviate Sexual Intercourse as one of the methods. If that stipulation is satisfactory, we can clear that up.

MR. LOKKEN: Yes, I have no objection to that stipulation.

MR. GARDNER: With that in mind, Your Honor, I would withdraw the objection to the sufficiency of the information and I would stipulate that the stipulation I just made may be considered by the Court for the purposes of reviewing the motion on the

[R154]

information and also may be considered in connection with the proof at the trial.

THE COURT: All right, sir.

MR. GARDNER: Is that satisfactory?

MR. LOKKEN: Yes.

THE COURT: So stipulated.

MR. GARDNER: Now just a short word, Your Honor, I know you have some additional questions but I told you I would say very little and I will. I think that what we heard yesterday tells us in effect that what is perceived as a major problem by the public officials and other officials in the area regarding prostitution, I think

it is an unfortunate happenstance that people tend to confuse consensual non-obtrusive homosexual behavior and interaction among homosexuals as somehow impacting on this problem. I think we saw that on the councilman's testimony and to some other extent in the other testimony we heard, as a matter of fact, as indicated by the Sergeant's testimony which I thought was very forthright, candid and correct, in actual fact there is no problem

[R155]

presented to the public with respect to the kinds of careful rather restraint [sic] communication that goes on between homosexual dealing and feeling out to try to find out who is among them and who would be receptive to that kind of conversation. And with that mind, I would point out in the answering affidavit certain of the things I think the Court should take particular notice of, namely, the District Attorney on page five of his affidavit indicates that the solicitation that is implicit in the statute quote, "it is directed toward strangers in public, not toward acquaintances in a secluded setting and involves an unbidden, pointed inquiry into a most private and intimate aspect of their lives." And, on the next page the District Attorney says the statute simply outlaws contact which inhibits the free use of public space by members of the society at large. The testimony you heard yesterday indicates, however, that number one, there is no inhibition of the free use of public space except as Mr. McCarthy indicated as he perceives

[R156]

it psychologically in himself and, number two, you can hardly say the invitation or inquiry is directed solely toward strangers in public when in fact, it's only



mentioned after simple attempt at — after acquaintances have been established and there's some reason to believe this on the part of the speaker and that the individual would be receptive to that kind of invitation. And after noting its interest, over all the fact remains the statute must stand or fall on its face and what witnesses tell us on the stand whether it happens to be favorable to me or favorable to Mr. Lokken is quite irrelevant. The statute is overbroad. If the police and public officials are concerned about the prostitution, the prostitution problem, they have statutes to deal with that; if they're concerned about acts of homosexuals that are so overt or so outrageous or so offensive and very obvious to people passing by, there's statutes to deal with that, and the legislature has power to pass additional statutes to that. This is overbroad because it prohibits itself

[R157]

as well as the overt, obnoxious prostitution type of homosexual, the quiet, musical, intellectual who simply is there and somehow gives himself away by some communication, it does not even technically require on the solicitation [sic]. I rest on my brief and ask that at this point it be declared unconstitutional.

THE COURT: Could you be more specific, I understand the different grounds in your brief and I know you rest on the brief, and I have heard the testimony of Mr. McCarthy and Mr. Freudenheim. But still, if you're a property owner and I realize these people did not come out with strong language, I remember that Mr. Freudenheim described his feelings towards what was going on in front of his hotel or what he thought was going on at his hotel as distasteful. Mr. McCarthy was talking about being apprehensive and saying it was an inconvenience

to have these groups of people on the street corner or on a street and the vehicle traffic, first of all, their tolerance

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MR. GARDNER: I understand.

[R158]

THE COURT: And Councilman Marcy, too.

MR. GARDNER: I understand. I don't attack any of them, their integrity and intentions I'm sure are fine.

THE COURT: I'm reflecting on these groups of people, or gangs as I said at one point yesterday, groups of people sometimes as much as fifteen and as we were told by Officer Burgstahler sometimes four or five in a block. They do prohibit somebody walking the street, I think even if they're middle-aged or elderly as occupying the Lenox.

MR. GARDNER: Let me speak to that if I may. It was in the 1950's or 1960's that the people of Dunkirk were very upset and annoyed and just as concerned as Mr. McCarthy was and probably more so by the fact that puertoricans [sic] living in a community would as a matter of practice stand out on the streets at night in groups of people singing, dancing, joking with people, whatever. But, large amounts of people on the streets which is typical apparently of the puertorican [sic] culture but it's not typical of certain middle class white Anglo-Saxon culture and it was disturbing

[R159]

to the people of Dunkirk. They passed some kind of ordinance to prohibit that, that was taken to the Court of Appeals and declared unconstitutional — and I'm sorry I can't give you a citation — but essentially they

said the law can't say that because we don't understand your ways and we don't like your ways and we don't like your ways and therefore you don't have the right to use our streets, we want you to use them as we do. Namely, you walk by, boyfriend-girlfriend-type thing and you don't stand at a corner for over fifteen minutes, we find that an affront to our comfort; and secondly, -Your Honor, I would point out to you that if a statute was judging [sic] by what the majority of a community found comfortable or acceptable or not annoying or whatever, there would be no need for a Bill of Rights because then we can have a parliamentary system and what Parliament said would be okay. I'm sure to this day there are many people who find interracial marriages unacceptable yet in the '40's or '30's at that time when it was less

[R160]

understood and less acceptable, particularly in other areas of our country, the Supreme Court said you have no right to declare it illegal and to prevent it even though almost unanimously among the white population of the South it was highly offensive but the Supreme Court said no, it's not good enough. So what I earnestly and respectfully submit, it doesn't matter whether good intentions, friends and citizens of mine who take the stand here find these people to be unacceptable and undesirable people in the neighborhood. We don't have a law that permits any more people to be moved out because they're undesirable, that's a tradition of our frontier past when the marshall would say, get out of town and don't show up again. It's impossible. I have to say to these people to the extent that can validly assert rights such as trespass and noise and harassment and things like that, those laws can be enforced but to the extent that merely because you are standing quietly and

living a certain life-style that neither approve of [sic] so you must

[R161]

get out of town. They have no support or law.

THE COURT: You're saying the fact finding in this may be irrelevant but I thought under People versus Smith case which I think we should just hear what was going on.

MR. GARDNER: I have no objection to the hearing but as I expressed at the very beginning, Your Honor, I have no objection to the hearing being held but at the same time I wanted the Court then to understand that I doubt very much it would have any relevance by the ultimate decision of the Court; at this point, at the conclusion, I reiterate that position. In People versus Smith, if I recall correctly, what the case is about, Your Honor, it is referring to I think as the case that had to do with the loitering for the purpose of prostitution statute, is that not correct?

THE COURT: Yes.

MR. GARDNER: And the Court of Appeals held that statute to be valid but in so doing the Court of Appeals noted that the Statute requires a number of specific obvious observations and events to happen before

[R162]

there could be an arrest and that it tended to take away the chance of unbridled discretion on the part of the Police Officer and also implicit if not explicit in that decision was the fact that the ultimate activity toward which the statute was directed related to prostitution which is insofar as illegal. In our case which is not at all untypical, we have a young man who invited someone to

his apartment and in the process of that invitation once there to participate in an act of sexuality, deviate, to the majority of Americans is nonetheless fully legal to Onofre. You have to distinguish the ultimate object of the safety as legal and, number two, you do not have in this section the kind of safeguards to the extent they are there for the Loitering for the Purpose of Prostitution. But in any event, I would point out that you can judge that by reading the statute. The Court of Appeals decided that *People versus Smith* on the basis of fact findings as to what community leaders felt was the problem, maybe I'm wrong there but I think ultimately the decision in

[R163]

*People versus Smith* was based on the Court of Appeals analysis on sex itself and the safeguards it presented. Also, I think it was an analysis of the facts of the case itself.

THE COURT: What did the officer see, what was the defendant doing.

MR. GARDNER: Oh, yes, that would go to the question as to whether the standards of the statute were in fact met but in terms of the issue as to whether this statute was constitutional, in one case the officer may have a good fact case and in another case the officer may have a less good fact case. The issue as to whether the case is constitutional, at least I submit it ought not to hinge on the fact of whether the issue in this case is whether the police have a solid fact case, rather than in another case where they don't have so good a fact case.

THE COURT: I understand that but if the Court were to write in without a fact finding of a lot of statements that occurred I think that would be wrong. In other



words, if there was no basis on some hearing to talk about the inconvenience to the

[R164]

public, to the shop keepers and whatever else they went off on to find these people with —

MR. GARDNER: I'm in no way criticizing the Court for holding the hearing, I'm saying as a matter of law it seems ultimately the decision whether the statute is constitutional, it has to be looked at as if one were there at the moment the law was passed and without yet having seen how it was going to be enforced. One can attack particular cases based on the facts of those cases but the question of the fact is that the statute has to be analyzed in abstract because the determination has to be the same for Salamanca as well as for Buffalo.

THE COURT: One other point I have, and I understand what you're saying about doing things in abstract and I needed to hear what those officers were saying, both Captain Kennedy and the other officer. I needed it because I can't conjecture up nor can I see where this does mount to a stag line up and down the street. In other words —

MR. GARDNER: Well, let me —

[R165]

THE COURT: In other words, say at some point we're not dealing with four or five people, say there's fifty.

MR. GARDNER: Suppose there's two hundred fifty, you could have a situation where you could have masses of people standing there all night long and it's difficult for people on the street to get some sleep and things of that sort. Without being tested too closely on my

knowledge of the present Penal Law, I think there are statutes including disorderly conduct, including loitering, including trespass and some other things that may come into play on those conditions. But, let's say there isn't that which comes into play on those kinds of conditions, the legislature certainly has the power to pass a law that is directed not to the presence of someone in public for the purpose of soliciting someone to engage in the deviate sex but directed to the real problem you're imposing, masses of people on a residential street who by their presence are creating legitimate concern of safety and peace and good order. I would hesitate to try

[R166]

to draft that statute as I stand here talking to you but what I'm saying is that that question has to be saved for another day. I would say this statute if it has got to be analyzed and can be approved, if Your Honor finds it's constitutional, if we assume that there are just two people on that street at a given point in time, one approaching the other for the purposes of making a solicitation similar to what is charged to have been made here, if it's constitutional under the circumstances then I say it's constitutional for the other circumstances as well. But, if you take out those other facts that the statute doesn't talk about there's nothing in the statute about how many people are present or how crowded the street is, whether it's residential or downtown. At the moment the officer said they no longer arrest people in gay bars for these kinds of solicitation but they used to and if you look at the statute they could still do it, there's nothing in the statute where it says in some public places it's okay and other public places it isn't;

[R167]

in a gay bar even though it's a place where people are going to hardly go if they're going to be offended by homosexuals it's nonetheless a public place, it's enough of a public place that if sex is going on officers still go in and arrest even now.

THE COURT: So what you see as a statute where at the present time as far as that kind of locale is concerned is enforced with some restrain [sic] but on the face of the statute it's still applicable?

MR. GARDNER: If I may make one other point but we had a problem — well, not a problem, Captain Kennedy was very unhappy when the Court of Appeals knocked out the consensual sodomy law and again he was concerned about the social problems that had been talked about in this hearing. As I pointed out at that time and is definitely clear, the legislature could even now pass a law outlawing public sex of any kind, homosexual, heterosexual, deviate or so-called normal; there's nothing to stop that, the fact that they haven't done so doesn't mean that the consensual sodomy law should have been left on the books,

[R168]

it means that someone yet has not carried the burden of persuading the legislature to deal with the problem in that way.

THE COURT: There's no question that a law could be passed to deal with that problem, I don't think your reference to public lewdness applies at all.

MR. GARDNER: I didn't suggest it necessarily. I was asking questions and I recognized there's problems of public lewdness pro and con but the point I'm saying,

you don't have a law which could be passed as no argument for leaving on the books an argument which is overbroad that even encompasses legal activity as well as

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THE COURT: One reason for the hearing is to get background for me and it's on the record of what is the so-called problem and how things — what happens when an officer approaches a group.

MR. GARDNER: I understand.

THE COURT: And I think in all it probably turned out favorable to you.

MR. GARDNER: I think so, too. And as I say, I claim no error and I made no objection to the holding of the hearing.

[R169]

THE COURT: Now, a lot of things you say and hear about the actions of homosexuals during arguments are things that I don't know enough and unless you can refer me to some other statute I have a hard time taking judicial notice of.

MR. GARDNER: I don't ask you to take judicial notice of anything in my papers, Your Honor, I think I made a motion and I've asserted in the papers what I think a plain reading of the statute shows in terms of how it will affect various situations. I don't propose to any truth to support that homosexuals do this or do that, my understanding and this is not submitted which Your Honor can take judicial notice of, but my understanding is there's over 20 million homosexuals in the United States and you're going to find all kinds of people in that group. Some of those people you and I would consider to be upright, honorable people with

high positions, judicial, politics, professional and so on and some who waste their lives on drugs and alcohol and things of that sort. There is simply no way one can generalize that these are what homosexuals are and this is

[R170]

how they act and therefore, this is what the law should say or should not say. The law has to be analyzed as if we were talking about cubans or any other group you would want to pick out and it has to be determined whether enough background to understand what the law is seeking to direct itself toward as to whether it does so without violating free speech or some other things I've mentioned in my papers.

THE COURT: In other words, your statements that homosexuals need to meet each other in public, correct me if I'm wrong, if I'm distorting what you said —

MR. GARDNER: No.

THE COURT: In situations like this so they can have full use of their life and liberty however they want to act — I don't know that they do.

MR. GARDNER: Let me speak to that specific point. In making that statement I'm here defending a criminal case, it would not be appropriate for me to bring in sociologists to prove the specific points, but the point I'm making and the point I think Your Honor does know is that there is no

[R171]

established socialtale [sic] pattern for homosexuals to deal with each other and get to meet strangers who are homosexuals. The society as it is is not such that if a lawyer were to appear before you who happens to be a



homosexual, he's, he's liable to tell you about it. Ultimately, if he were a heterosexual it would be quite the nature for him to hold hands with his wife as they left the building, if on the other hand, they were to walk out of the building holding hands with another gentleman even though it's not illegal it would be found quite offensive in the ingrain [sic] cultural habits and patters [sic] of modern American life. Is that impetus as for the homosexuals to remain in secrecy. The only thing I'm saying to Your Honor is that it must be obvious to all of us that that being the case, being the case you don't have open meetings of homosexuals, Kawanis [sic] Clubs or anything of that sort; insome [sic] way if you have 20 million homosexuals in this country, you have to be of the nature — I don't think they have been but they could be, celibate.

[R172]

It's not a standard applied to heterosexuals but if they intend to have to meet each other they have to reach out and find each other. If they don't happen to drink or they're not into the bar scene, I don't know of anyplace in Buffalo they can go. They're not going to be shown on television in advertisements, you don't see advertisements in the newspaper that there will be a meeting of — with people interested in making — meeting homosexuals. One doesn't need to prove the world is round, one can observe the nature of the world if a country of massive quantities of homosexuals want to meet a homosexual at some point, somewhere he'll have to reach out and try to become acquainted, that's all I can say. Surely we know and it doesn't have to be proved that you have singles bars where people go and meet for the purposes of meeting girls and vice versa, maybe they don't immediately talk about sex or maybe they do, I don't know, but the scene on Elmwood Avenue is a

place for guys and girls going out certainly it isn't something that has

[R173]

to be proven. The point is there's enough on the face of the statute to analyze whether this cuts equally across the board with heterosexuals and homosexuals. I think there's enough for the Court to reach a decision to the constitutionality of this statute in this context.

THE COURT: I think the witnesses were too sensitive and tolerant to talk about what they clearly could show by dollars and cents; was that there property was in danger of losing of its value, the enjoyment of that and there was a substantial chance that their businesses would be affected or what's going to happen in the future.

MR. GARDNER: That's right, it's sad. I suspect there's people on my street who would say the same thing of their values if black people were to move in but that doesn't give any legitimacy or any effort to try to keep the black people out.

THE COURT: Or cubans, blacks —

MR. GARDNER: That's right. There's no legitimacy. At some point we have to say this is a nation of laws, civil rights, bills of rights, and you have to work out your personal feelings and you have to

[R174]

try to do the best you can, but we don't take away rights just because the owner of a hotel feels uncomfortable or because living on Irving Place you feel psychologically effected because these people are around.

THE COURT: And your interpretation of the law is specifically what now, you talked to the right of people expressing themselves, etc.?

MR. GARDNER: Putting aside the argument of vagueness which I grant the facts of this case don't really present because that portion of the statute couldn't come into play, and put aside the argument of unequal applicable laws which I think is argument but not what I'm fond of because it's so easy for legislature to remedy. For example, as I suggested to Councilman Marcy, I could go out and solicit him for sex and I'm guilty, I could go out and solicit his wife for sex and I'm not guilty, ultimately both acts are highly offensive. Now the real point is, I don't think the law can validly say that a man or woman in public for the purpose of meeting a man or a woman and inviting that person

[R175]

to a private place to engage in deviate sexual activity, I don't believe that kind of law can be passed as long as the conversation is secret; it is not notorious or apparent to other people who can overhear the conversation and as long as the invitation is directed at an act that will occur in private and as long as the individual who extends the invitation takes no for an answer. In effect, the person who hears that invitation, "no, thank you, I'm not in for that", and walks on, as long as that person says, "okay", and walks away, I don't think the law can intervene. Now the person who says that may run the risk of getting his nose punched in, that's one of the practical risks of this life, but that's different from the law saying you shall not issue that type of —

THE COURT: What is your basis when you object to the law, why? You've gone through vagueness, and the equal protection?

MR. GARDNER: It's all in my papers, all I can do is read my original motion papers, Your Honor.

[R176]

THE COURT: I dealt with this under the guide lines of the Equal Protection Law?

MR. GARDNER: Well, I wanted to emphasize that so you'll see in my motion papers that I stand heavily on the concept of the right to speech, right of free association and the absence of any legitimate public purpose that the government can have to prevent one individual from having a private conversation with another individual and inviting him to his house for any lawful purpose. If I were to ask Mr. Lokken to come to my house to have a drink of beer that is no more unlawful or no more subject to being made unlawful if I were to invite him to my house to engage in deviate sex, as long as the act of deviate sex is lawful as Onofre teaches us it is.

THE COURT: Onofre, the only grounds for public action cannot be violated under the Equal Protection Laws.

MR. GARDNER: My point is that Onofre was talking about the sex acts itself.

THE COURT: That's true.

MR. GARDNER: And my point is when sex — the sex act itself is to occur in private the fact that the invitation

[R177]

is discretely conveyed even at a public place, it is not — cannot not be prohibited, not everything that occurs in a public place can be prohibited by government nor everything that occurs in a private place is immune from prohibition.

\* \* \*

[R185]

MR. GARDNER: As I understand it from remarks off the record late yesterday, we have stipulated and we should formalize it on the record now, that in view of the fact that Your Honor is going to reserve decision on the motion as to, which we've concluded all of the testimony and all of the arguments and in view of the fact that the

[R186]

arresting officer is present, the District Attorney and I have stipulated that we go forward and hold the trial now recognizing first that as you indicated earlier the testimony you hear at the trial can be considered by you in connection with the motion if you wish, and recognizing also that if you were to grant my motion there would be no occasion for you to render a verdict on the testimony of the trial and therefore, you'll be in effect making a decision on the motion and if it's appropriate on the trial at the same time.

THE COURT: So agreed.

\* \* \*

[R187]

(WHEREUPON, OFFICER BURGSTAHLER THEN  
RESUMED THE WITNESS STAND.)

BY THE COURT:

Q. Officer, you've heard many of the comments while you've been out there sitting and waiting? A. I've heard some of them, I was in and out.

Q. I have a few questions. You gave me numbers and averages, things like that yesterday concerning both homosexuals who are not overt and the ones who are either homosexuals or male prostitutes working in that Allentown Street area — A. North Street.



Q. North Street. I gather you told me you do make arrests from time to time of prostitutes in that area? A. Male prostitutes, yes. We do.

Q. And that's by going up in a car, your own cars or something like that, unmarked car, getting them to come over and there's an offer made? A. That's one way or on foot. But we also makes arrests for loitering that way where money is not —

[R188]

Q. In other words, would a male prostitute be in a car and also on foot, either way? A. Not usually. They would usually be on foot.

Q. These are generally the younger people? A. Usually.

Q. And when you testified there's groups of people there, four or five in the summer as I think a figure that you mentioned, and sometimes fifteen in the two block area, during the evening, would there usually be male homosexuals in those groups, if you know, or if you could tell? A. Well, there could be. It would be hard for me to —

Q. Are their actions any different from other people. In other words, the people you believe to be homosexuals? A. Well, to my knowledge, there would — they would be more overt, more active.

Q. Are they the ones flagging the cars? A. Yes. Right.

Q. How would you know when the homosexuals would have customer, would they slow down or something? A. They drive through the area several times, they look at you if you're standing there, they pull over to the curb and park and blink their tail lights if they want you to come up.

[R189]

Q. From that and from these other actions, could you tell — So, it's generally the male prostitutes that would be standing there and these would-be customers come up? A. That's true.

Q. And the prostitutes would be the fellows flagging the cars and responding to these cars? A. Yes. More so than the regular person who's out for just meeting somebody.

Q. These people generally meet one another on foot?  
A. Well, that's hard to determine.

Q. Does it lead to a lot of congregations in the area?  
A. Sometimes it does.

Q. Like what, describe it? A. A car will stop right on North Street without pulling over to the side of the street and it's hard for another car to get around him.

Q. On nights when there's a great deal of activity there I guess on weekend nights in the summer, would there generally be — I have a hard time getting pictures — there would be people on North and Delaware bus stop bench? A. Yes.

Q. And these would be people you would suspect or have reason to suspect would be homosexuals, is that correct?

[R190]

A. Well, I wouldn't suspect all of them.

Q. But some? A. Yes.

Q. And then do you know at different locations in this two block area or even three blocks or four block area, that there would be other people spread down? A. That's true.

Q. And then where you get a congregation of these people spreading down the street, some of these people would be male prostitutes? A. Yes, that's true.

Q. So intermixed in these people there would be the male prostitutes trying to — A. That's right. They would be —

Q. They generally get their customers by cars? A. Well, that's where I would assume they do, I'm not saying they don't get them on foot either.

Q. From your observations, how many of these people — how many of these people that will be down there would be prostitutes? A. (No Response).

Q. Does it vary too much? A. It's hard to determine that. I don't know what percentage

[R191]

to say would be down there.

Q. But generally the people that are flagging cars down are the prostitutes? A. Well, usually I would say.

Q. How much effort is made to arrest prostitutes themselves? A. Well, we patrol that area every night, and if we see a group of people there then we're going to try to make arrests.

Q. You try getting in a car and bringing it up — A. Yes. Or we might walk the area on foot depending on what's in the area. If there's a group of people in the area —

Q. Is some of it determined to scare them off because they know who you are? A. Oh, yes. Most definitely, especially if they know our police car. Yes, they move.

Q. Do you have reason to believe that some of the people that are there at night are male prostitutes because you see them again and again? A. Oh, yes. Most definitely.

Q. And, some are just strangers that come and go and just leave? A. That's true.

[R192]

THE COURT: Anything else?

MR. LOKKEN: I have nothing further.

MR. GARDNER: I just have a couple questions:

## RE-CROSS EXAMINATION BY MR. GARDNER:

Q. Officer, it's true, is it not, it used to be that there was a substation [sic] of male prostitution activities on Washington Street? A. Yes. There was.

Q. And when that was going on, was there prostitution activity by males up on North Street, to your knowledge? A. I don't know if there was any prostitution activity up there.

Q. But, there was, was there not, prostitution activity by homosexuals on North Street meeting friends? A. That's true.

Q. Is it fair to say that your enforcement efforts in downtown Buffalo have pushed the male prostitutes off Washington Street and that some of them migrated up to North Street area where the homosexuals have already been in for years past? A. I would assume that could have happened.

[R193]

MR. GARDNER: Thank you.

THE COURT: Anything else?

MR. LOKKEN: No.

THE COURT: Thank you, Officer. That's all. All right, pursuant to stipulation do you intend to call Officer Nicosia?

MR. LOKKEN: I call the arresting officer and at this point we're starting the trial as a matter of formality.

THE COURT: And as I said before parts of it I might consider the hearing itself.

MR. GARDNER: That's all right.

MR. LOKKEN: Would it be straying off the facts of this case, that's one matter we did not clear up. Would counsellor's examination — cross examination entitle him to expand?

THE COURT: Sure.

MR. LOKKEN: During this trial?

MR. GARDNER: So that's clear, I don't want to create any error in this record, Your Honor, I have no objection in view of the fact there's no jury. Your Honor is the decider of the facts and you've heard everything anyway, I would not raise relevancy objections on any of the testimony

[R194]

and I would rely on the Court to make such application of testimony as appropriate under the circumstances.

THE COURT: Is that satisfactory?

MR. LOKKEN: Just to that's clear.

THE COURT: All right.

STEVEN NICOSIA, 74 Franklin Street, Buffalo, New York, having been duly called and sworn as a witness on behalf of the People, was examined and testified as follow:

DIRECT EXAMINATION BY MR. LOKKEN:

Q. Officer, you're assigned to the Bureau of Vice Investigation in the Buffalo Police Department? A. Yes.

Q. Was that your assignment on August 7th of this year? A. Yes. It was.

Q. And were you on duty at approximately 3:00 A.M.? A. Yes. I was.

Q. And at approximately that time did you have occasion to arrest one Robert Uplinger?

[R195]

A. I did.

Q. Is Mr. Uplinger in court today? A. Yes, he is.



Q. Would you point him out and identify him by what he's wearing now? A. The gentleman in the striped sweater sitting at defense table.

THE COURT: The record will reflect the witness has identified the defendant.

BY MR. LOKKEN:

Q. Now, what were the circumstances leading up to this arrest, Officer? A. I was standing in the area of 140 North Street at approximately 2:50, I would say, and Mr. Uplinger walked up to me and began conversation; it was just a brief conversation more or less to the extent of hello, how are you, that type of thing. After a little bit of a conversation the defendant asked me if I wanted to get high and I said no. He said, "well, what do you like to do?", and I said, "I don't know, what do you like to do?". This went back and forth for a minute or so. A few minutes later and undercover police vehicle pulled up to the vicinity of 140 North

[R196]

Street where myself, the defendant — let me go back a little. Three or four other males came up to this 140 North Street which is the step of the Hotel Lenox, Mr. Uplinger introduced me to several of these males, just after that, this undercover police vehicle pulled up and told us all to get off the steps and leave the area of the hotel; we all left in separate directions, I walked west on North Street away from the hotel, Mr. Uplinger followed me and he asked me if I wanted to go to his place and again I asked him what he wanted to do and he said something to the effect, well do you just want to come over. And I told him no. Getting back to the undercover police, they identified themselves as Police Officers. I told him, no I'm scared with the police and I want to leave — I'm going to leave and he said, well if you drive me over to my place or go over to my place I'll blow you. At this time along with Officers Burgstahler and

McConky of the Vice Investigation Unit I placed the defendant under arrest. And this was at 3:00 o'clock.

Q. And repeating the terms, officer, I'll blow you meant oral sex? A. It's commonly referred to as oral sodomy.

MR. LOKKEN: I have nothing further.

[R197]

THE COURT: Mr. Gardner?

MR. GARDNER: I have no questions, Your Honor.

BY THE COURT:

Q. How long have you been on the Vice Squad or worked with the Vice Squad? A. A short time, Your Honor, since December of 1980. And during that time I was off for three months with an injury so it would maybe have been about six months or so.

Q. Have you patrolled this area on North Street before? A. Yes. I have.

Q. Have you ever made arrests in the area? A. Yes.

Q. How many would that be? A. In that immediate area I would, I believe, just one. I've patrolled the area, I've only been assigned there by police working undercover two or three times.

Q. Have you ever been assigned for this sort of investigation before to any other area where suspected homosexuals would congregate? A. No, sir.

THE COURT: I have nothing else.

[R199]

STATE OF NEW YORK — COUNTY OF ERIE  
CITY COURT OF BUFFALO

THE PEOPLE OF THE STATE OF NEW YORK,  
vs.

ROBERT UPLINGER,

*Defendant.*

DOCKET NO.: 4C-58993

[Proceedings of October 22, 1981]

\* \* \*

[R202]

(CAPTAIN) KENNETH KENNEDY, 3160 Hopkins Road,  
North Tonawanda, New York, having been duly called and  
sworn as a witness on behalf of the People, was examined and  
testified as follows:

BY THE COURT:

Q. I had some further questions about the status of the hearing and I wanted to ask you a question and Officer Nicosia, also. I just have a couple questions. A. Pardon?

Q. I just have a few questions of you. A. Sure, Your Honor.

Q. First, you are familiar, are you not, with this law, the loitering for the purpose of deviate sexual intercourse? A. Yes, Your Honor.

Q. And you've been a policeman for what, thirty-five years?  
A. Forty years.

Q. And are you familiar with the prior law under which I believe it was applied only against homosexuals, the disorderly

[R203]

conduct statute? A. Yes, briefly.

Q. Which was phrased pretty much the same way except that you had to have disturbed the public and I think it was couched in soliciting men, something like that? A. Yes.

Q. Now, under the previous section, the disorderly conduct, that was only applied to homosexuals, am I correct? A. Yes. Generally speaking, that's what it was, Your Honor, I think it referred to a soliciting for the purpose or something about an act against nature, I think it has that in there, and it was generally applied to suspected homosexuals.

Q. The point being, under the prior one and the new one, which came in 1967, the one we're dealing with today, am I correct in assuming that until Onofre came down, right? A. Yes.

Q. And in the Court of Appeals — the Appellate Division which throughout the sexual — A. The sodomy law.

Q. Consensual sodomy law? A. Yes.

Q. Until Onofre came down, both the old one and the new one were only used against suspected homosexuals?

[R204]

A. Yes. I would say so, Your Honor, generally speaking that's what it was.

Q. Okay. A. There may have been rare cases where it was used otherwise but mostly it was in homosexual situations.

Q. So, only with Onofre did — frankly, the Police Department was trying to get around Onofre after it came down from the Appellate Division, did you start to use the loitering statute against the suspected prostitutes and their customers? A. Yes, Your Honor. And sometimes we would use it previously in

cases where there wasn't evidence of prostitution but of course, we had the sodomy law and we would mostly use that.

Q. You would use the sodomy law? A. Yes.

Q. Where would — A. We would catch them in an act of sodomy and then we would use the sodomy law, the violation of the sodomy law.

Q. So, then, am I correct in saying, then when the sodomy went with Onofre — A. Yes.

Q. — then you used this loitering statute?

[R205]

A. Yes. Almost exclusively.

Q. Because that's what it seemed like to me and that's what has been represented to me and that's why I'm asking the question. A. To my knowledge, that's what we've been using it as. And if we get a male and female in that same type of situation generally we stay towards the prostitution but we will use that law also, loitering.

Q. Now, we had testimony here — and I'll get back to what was testified to about North Street and Allen Street — A. Yes.

Q. — do you have a problem in LaSalle Park about suspected homosexuals? A. Yes. We do, Your Honor.

Q. Would you tell me and both counsel what problem that is? A. In LaSalle Park?

Q. For instance, we heard about suspected homosexuals or homosexuals or prostitutes on the corner of Delaware and North and down these two or three blocks of North to Elmwood? A. Yes.

Q. And we've had a lot of testimony from Officer Burgstahler, yourself, Nicosia and different residents — A. Yes.



[R206]

Q. — and you eluded [sic] generally to what you say is happening in LaSalle Park. Could you be a little more specific about that? A. Yes, Your Honor. Well, LaSalle Park, the situation there is we have some complaints but not near as many as we had in the Delaware-North Park area, Delaware and North area, and I attribute that to the fact that Delaware and North is a residential area where there's many homosexuals and many people view these conditions and call and complain about them. Wherein with the LaSalle Park, we would sometimes get complaints from parents or sometimes young boys would call in from other police agencies, police officers and say that the conditions down there are terrible and that there's a great deal of overt sex acts taking place right out in the public where the boys are playing, this is coming from the youths in the park, it's in full view. They say they go back into the bushes a slight ways and anyone walking along there all they have to do — in fact, I recall one complaint where they said the young kids were standing there giggling at them, watching them. We did quite a bit of work down there on investigations.

Q. When you have a situation like that and I have a question in my mind whether the public lewdness statute actually covers

[R207]

it — A. Public?

Q. You have to do it lewdly? A. Yes. Most of our arrests were under sodomy laws or else the officers would be directly solicited.

Q. So, now, with Onofre you can't prosecute anybody under the constitutional sodomy law? A. No.

Q. So, what do you do, go to the public lewdness or not at all? A. We use the loitering.

Q. Loitering. Well, other than the sex taking place in the bushes and things like that, is there anything else that disturbs people down there or you've received complaints about?

A. No. I don't think so, Your Honor. It was mostly of a nature of solicitation and young boys seeing acts taking place, then, of course, through our observations and through our surveillance of the area we would see that there would be cars parked there and men sitting in them and then they would be loitering around, walking around the fields and in the bushes and so on, apparently seeking a companion to commit these acts with.

[R208]

Q. LaSalle Park is where the kids have little league baseball?

A. Yes. There's baseball fields, football fields, swimming pool in the area, a large park area, playgrounds. Now the general section which this activity was taking place was on the same side of the street of some of these areas where these young boys would walk through the curbside and in the fields to walk through to get to the swimming pool or in going back over to where the general playground is. In other words, it would be on the far side from the lake there.

Q. That's on the east side? A. Well, it would be almost up a little bit to where the pumping station is, I'd say the length of a good city block. A. Other than watching and seeing activities, these activities which you say is interaction between the men and you say solicitation — A. Yes.

Q. — are the children offended or the parents offended by anything else that goes on? A. No. Not that I know of.

Q. In other words — A. I know one of the Police Officers told me the young kids there are playing ball and going through and seeing all this and —

[R209]

Q. And kids are solicited, are they? A. Well, I would assume, Your Honor, there's a danger that they may be solicited.

Q. You've never had a complaint? A. No. I don't know of that, no, sir.

Q. Is this near the men's room? A. Yes. There's a men's room — shelter house in the park there but the park is across the street and then in the area where the — most of the activity was was [sic] across a small street there from the men's room.

Q. D.A.R. Drive? A. Yes. That's right, that's what it is.

Q. So, there's only one bathroom facility in the whole park and this is occurring around the bathroom facility? A. No. Like I say, it's across the street.

Q. In the bushes across the street? A. Yes. Generally in the bushes or you see them loitering around on the edges of the bushes and so on walking around and that's usually an indication, you know, if he's not bothering anyone or not doing anything wrong then we won't bother him. But, then the officers were stationing themselves and there would be a short time that they would be solicited or else they will see an actual sex act.

[R210]

Q. There's no complaint of prostitution down there? A. No. I've never heard of any complaint of prostitution in there.

Q. Now, from the testimony here and I grant you I did understand what you said when you testified here about North Street and Allen, mainly North, Delaware and those streets there; you testified to a lot of soliciting going on by homosexuals of homosexuals? A. Yes.

Q. And of prostitution by male prostitutes? A. Yes.

Q. In that area? A. Yes.

Q. At night, mostly in the summer and on the weekends?

A. That's right.

Q. I just want to make you aware of certain testimony that seemed to crystalize it more and that's why I want to make it known to you. Councilman Marcy, the councilman from the area, took the stand and he testified if my recollection is right, that all the complaints he had related to the activity of male prostitutes? A. Yes. I think we had some complaints from him.

Q. He wasn't talking about homosexuals and homosexuals, he was

[R211]

talking about just male prostitutes? A. Yes.

Q. Or what he took to be complaints — implied complaints of male prostitution, he didn't talk about homosexuals? A. No, I don't think so.

Q. So, that's what I heard here? A. Yes.

Q. Kenneth Burgstahler testified that the people that are there attracting the cars, the males that are on the corners at night, a lot of people there, the males flagging down the cars and getting in the cars, there are male prostitutes, they are the active ones? A. I would say some of them are, yes, Your Honor, but it's just this apparent homosexual activity, solicitation or hanging around in that area. Now, the male prostitutes are generally a youth group, a younger group, and we had complaints of male prostitution there. We had complaints where I got a complaint from the State Police last time I testified, I didn't testify to it because I had forgotten, but I had a complaint from the State Police that one was supposed to be carrying a gun, one of the suspects, and that there was — I

think he said four or five young male homosexuals that were being promoted by a procurer who was in the area who

[R212]

we had known to be in the area.

Q. I don't doubt there's male prostitution because that's what everybody said. Officer Burgstahler said that the ones — as people go through this group the ones that are there talking about the blatant sex acts, the ones mentioning the words, those are the male prostitutes? A. I'd say, Your Honor, there are not male prostitutes, but they know the area was saturated by the complaints I've got about male homosexuals. I don't think it's a male prostitute. The one woman who called me who said her teenage boy would go out and ride his bike and she would — he would be solicited at about 7:00, 8:00 o'clock at night by men. She said he couldn't ride [sic] a bike but yet they would solicit him. I don't think they would be soliciting him for the purpose of prostitution and he wasn't a prostitute, she was complaining about it and she said he was deeply offended by it and she wanted something done about it.

Q. That would probably be a homosexual? A. Yes.

Q. But, again, officer Burgstahler testified that he couldn't tell — he knew, obviously, that there were some homosexuals there, he knew there were male prostitutes, he couldn't tell how many of each there were but they seemed to be

[R213]

inter-mingled — intermixed, but the point being the active ones, the ones really jamming the traffic and most flagrant of whatever they're doing are the male prostitutes? A. Yes. They could be, Your Honor, but I would say that the homosexual himself will go in an area and then there's a [sic] young male prostitutes that will be there and there's no conflict, you know, each one knows what they are but then the regular homosexuals



are generally an older person that you can have easily observed or at least say that it's suspicious after observing him for a short time and there were many of those in the area that we would see. Then younger prostitutes, a male prostitute, wherever we have complaints of a great deal of homosexual activity with the exception of LaSalle Park, I haven't seen the male prostitutes there nor have I heard of any, but like for instance we used to have years ago around the Hotel Lafayette, we used to have a great deal of activity, there would be a great deal of homosexuals and there would be a great deal of prostitutes. In many cases the homosexual is seeking out the male prostitute but then he's also available or seeking out other homosexuals.

Q. Well, did you say there is a connection then from your experience mainly on North Street which we're talking about

[R214]

between the presence of homosexuals looking for other homosexuals in the presence of male prostitutes? A. Well, I would say yes, Your Honor. If the male homosexuals are available — the male prostitutes are available, then the homosexuals would go to that area and there will be a connection in that aspect of it. Then, generally these male prostitutes are young, rough, tough kids that are pick-ups and someone who's a procurer in that angle will tell them go to this area and go to that area and they will be in that area. Now, word travels very very fast and then the homosexuals will go there in hopes of soliciting and possibly anticipating one of these young men or else he will meet another homosexual for his acts which happens quite frequently when the police officers are solicited they are approached and it's generally just an offer, it usually isn't prostitution. In other words, the homosexuals will pull up and conversations will take place, it will indicate he wants to commit one of these acts or wants the officer to commit an act on him but sometimes money will be mentioned but very very seldom, it's generally just a meeting and then an agreement.

Q. From your experience I guess Washington Street is no longer a problem?

[R215]

A. Pardon?

Q. Washington and — A. Lafayette and Clinton Street in that area, that used to be a very prominent place for them but it isn't so bad now. There are some of them but nothing like it was. They used to circle the block, they used to walk around there and be around there and you would see them quite frequently.

Q. And there you would find the homosexuals and male prostitutes mixed? A. Yes, Your Honor. As you say, it's been my experience that they will quickly know where these places are and that's where they will be and this is what led to many complaints in the North Street area as a continued flow of cars around there.

Q. Let me ask you this. Were you able to pinpoint — has this activity that we're talking about, prostitutes and male homosexuals, has complaints picked up, has there been more activity of it as the years go by? A. No. In the height of the summer, Your Honor, we had quite a few complaints.

Q. I don't think you had a problem like you don't have as much activity five or six years ago as you have now. Is that correct?

[R216]

A. It fluctuates an awful lot but I think we did have, Your Honor, I think there was more or less in different places and so on, but I know we have had in the North Street area, that's been a continued complaint — source of complaint. In fact, one of the woman that called me, she said you cleaned this up several years ago and now they're all back, can't you do something about it now. Like I say, it seems in the summertime — and I'm going back four or five years ago and maybe even

longer, that that area seemed to track them to the extent of all this cruising and even the complaint about traffic jams where the cars were bumper to bumper and I would go down there and see that and my men would go down there and see that. I can't say all these people were homosexuals but then it would appear they were looking for something. And when my men would be solicited, it would take a while and maybe they would question them or something like that but they would be suspicious of something starting or something amiss that there was something going to happen.

Q. If you know, did you have different areas that changed, in other words, the problem where the activity around Washington Street has lessened, correct? A. Yes. I would say it's less now. We made a major arrest out

[R217]

of there of what we classified as a major procurer, and he seemed to be the center of a great deal of activity but I still get reports of some activity there, but nothing like it was.

Q. Do you have any areas where problems have increased or traffic has increased? A. No. I don't think so, Your Honor. In fact, I think there's an increase of activity of units, gay units and so on where they go for themselves to dances and stuff and they're not out on the street as much as they used to be. We used to have an awful lot in theaters and now there is some activity in the summer around the X-rated theaters where they show these X-rated movies and there's some open sex acts taking place there, homosexual acts, but it's nothing like it used to be. For instance, years ago we used to have right across from Douville [sic] and Prospect Park a shelter house that was saturated with homosexuals, at that time sodomy was a felony and we brought so many in the legislature got together and said we can't be charging all these people with felonies and they changed it to a misdemeanor. We used to make massive arrests in the place and you couldn't go in the place without someone

soliciting someone. But in response to your question, I don't know of anyplace that's open or

[R218]

that active now, all I will say is that that area in North Street does become active in the summertime and now we're hoping it will level off with the cold weather and so on.

Q. Now, as it's been testified here, let's say you have a male prostitute standing alongside or down the street from or even on the same corner with a homosexual — A. Yes.

Q. — apparently both looking for customers or companions — A. That will happen from time to time, yes.

Q. — wouldn't it stand to reason that if the male homosexual is just standing there looking for somebody he isn't too interested in the fellow down next to him or a block away would be a male prostitute? A. Yes.

Q. He's looking for his own kind of companion rather than a male prostitute? A. Well, no, Your Honor, if the male prostitute is young and attractive to him then he knows he has someone right there but, he's going to have to pay. But he will turn to the male prostitute.

Q. If he can't get a companion, he'll turn — A. That's right. Or if a male prostitute is someone he — young and youthful are selling points in this male prostitution

[R219]

area and if he's young looking to him and attractive enough looking to him then he'll immediately go to him. But, if he doesn't want to spend the money or doesn't like the looks of these young lads and many times, I understand that they're afraid of being mugged or being beat up or something like that, then they won't go with them.

**THE COURT:** Will you excuse me for a second.

**(WHEREUPON, COURT THEN STOOD IN RECESS.)**

## BY THE COURT:

Q. How do you know there is this connection that you described, if there is a connection between the homosexuals standing in some area, some distance away from a male prostitute? A. Connection, Your Honor?

Q. Yes. A. Well, generally they will be approaching one another and talking, something similar to that. In fact, they have a means of communicating which puzzles me through the years, at certain times where one would just look at each other and all of a sudden they would walk into an alley or a car and start their sex acts, this is between a male prostitute and homosexual.

Q. Do you know if there's any connection between finding the two in one area?

[R220]

A. Between them being in one area?

Q. Do you know if there's any relationship between a male prostitute being in that same area as a male homosexual?

A. Well, I would just assume, Your Honor, the homosexual is there not necessarily because of a [sic] male prostitutes being there but the male prostitute is there because he knows there's homosexuals in the area and they're the ones that would be seeking him out, I think that is a connection. Now, actually you must not be able to describe it as an actual connection or agreement but then if the male homosexual is available the homosexuals are going to quickly find out. Hey, there's a lot of young kids down there, let's go down, or whatever, there's conversations and then they go down into the area.

Q. Now, due to the fact that there may not be any homosexuals there at all but there can be a lot of homosexuals there that one is seeking out the other and they will quickly respond wherever there is an area where they're noticed or out in the



open. You mean prostitutes will follow the homosexuals home?

A. Prostitutes will find a homosexual and homosexuals find other homosexuals but, say, you have two or three homosexuals in any given area and they're going to be around the area for

[R221]

any length of time, a street corner or whatever it may be, and if it's convenient for them and why they select certain areas of the city I don't know, and when they do and once they establish their activity there, the word spreads around and then you'll see a lot of suspected homosexuals in the area and then suddenly you will see the young suspected male prostitutes come into that area.

Q. Has this been your experience? A. That's been my experience through the years, Your Honor, yes. And like I say, why they select them now — years ago we used to have at Main and Clinton, there used to be an area right in front of Kleinhan's Clothing store across from the Liberty Bank and it used to be saturated with them, that was many years ago, that's when I first came downtown on this type of [sic] work.

Q. But, in my own recollection and from working in the District Attorney's Office, I remember a killing, I remember it because I prosecuted the fellow who did not do the shooting, it was Houser and Feenie; Houser just got reversed and he took a plea anyway. It was a killing of a "John" and a "Homosexual John", I think it was a "John" in the back of the Hotel Lafayette at Ellicott and Clinton? A. Yes.

[R222]

Q. And the fellow was shot dead right there. I remember it not because I had anything to do with the case but because fairly recently one of your men, Marty Harrington and Paul Madson had a run in with a fellow who was a male prostitute

and one was — one of your men was pretending to be a male homosexual and both of your men ended up shot? A. Yes. Both of them ended up shot, in fact, one was very seriously injured and the other one, it just missed his heart by inches due to the fact that he had a fountain pen-flashlight-type of thing in his pocket, otherwise he wouldn't be here I don't think.

Q. The shooting at Ellicott and Clinton occurred about 12 or 13 years ago and the other one involving Harrington and Madson occurred about four or five years ago on Oak Street? A. I would say maybe three years ago, Your Honor.

Q. But regardless the point being that prostitution be it with female prostitutes or male prostitutes, it does pose a certain danger to the "John" be it male or whatever, a male "John"? A. Yes. The Police Department file, Your Honor, is filled with transactions of that type leading to murder and serious assaults and many times it happens where the prostitute, the male prostitute will be disguised [sic] as a female and the "John" or the customer will not be aware of that until he

[R223]

starts his activity and then he's aware that he's with a male instead of a female and then he wants to back off and then the male prostitute wants his money and all of a sudden —

Q. That's really female prostitution? A. Yes.

Q. I think the two people from the area, both Mr. McCarthy the homeowner, and the other man, the owner of the Lenox Hotel, I think somewhere in their testimony they talked about a problem they identified in their neighborhood which would be the North Irving area, North Delaware Avenue which would be on North Street, there's a problem with male homosexuals and male prostitution. Is that correct? A. That's right.

Q. And to the south on Allen Street there's a problem with female prostitution and general drunks and whatever else you have down there? A. Yes. That could be true, yes. Usually the

females occasionally they will come to Delaware and North but generally they will work down further and the males will use the main fare [sic] lanes. I received complaints about that, that there are, that they're using the parking ramp of this apartment house for their activities.

[R224]

Q. Are there homosexual bars in the Allen Street area, Allentown area? A. There's some of them, Your Honor, up around Main and Allen, there's two or three of them located there, Villa Capri and then there's a couple around there that I suspect but actually we haven't made arrests out of them. We see groups of people but like I say, it's difficult to classify them as homosexual bars.

Q. Why doesn't their socializing take place in bars? A. I think a great deal of it does now, Your Honor, more so than it used to and I think that's the fact involved that there's less of them out on the street and less of them soliciting and performing their acts outside. It's been quite a lengthy time now since we made an arrest in the bars, we go to them same as heterosexual bars; my men will go in and make observations or surveillances and then if they see something wrong or if they're solicited in there, they will make an arrest but it's been a long time that we've even made an arrest in a homosexual bar. Of course, the law used to be different, too, but then again, there used to be more solicitation around the homosexual bars and the law -- we -- the Alcoholic Beverage Control Law used to read that it was disorderly for homosexuals to be hanging around, in other

[R225]

words, in a bar and especially convicted homosexuals if we could identify them as convicted, and then the premises will be adjudged disorderly and we used to make reports to the State Liquor Authority frequently on that. It's been a long time since

we had to do that, most of them are very well policed and like I say, I can't really say there are homosexual bars.

Q. Finally, do you have or do you know of incidents of crime relating to male prostitutes in the North Street area? A. I have complaints and information, Your Honor. Like I said, one of them was supposed to carrying a gun but actually in that area I don't know and of course, it very easily could happen without me knowing; I don't know it to have an awful lot of assaults or robberies or things like that. You know, some of thathas [sic] happened up in the Allen Street area by prostitutes but there's quite a bit there in the Allen-Main Street area over a little further, but it's considered the Allentown area, but at North and Delaware and so on, I don't know of a lot of crime taking place there. There was one serious assault in one of the bars on Allen Street there, now whether that was a homosexual activity related, I don't know but I know a young man who was very seriously stabbed and wounded, that was probably, I'd say,

[R226]

two monthsago. [sic]

Q. Are these male prostitutes, male homosexuals who are some of them? A. No, Your Honor. I think they're just young street-wise kids that are out there strictly for the money, I don't think most of them are homosexuals. I suppose there are — there have been cases where there's been male homosexuals that have been male prostitutes, too, but most of the young ones that we see on the street while they're engaging in homosexual acts are, I think, just there for the purposes of commercial aspects of it.

THE COURT: Does anyone else have any questions?

## CROSS EXAMINATION BY MR. GARDNER:

Q. Captain Kennedy, does your squad ever prosecute anybody under the Public Lewdness Statute? A. The Public Lewdness Statute?

Q. Yes. A. No. I don't think so. I don't think we've used that, there may have been occasions that we used it, but it's been a long long time.

Q. You gave the example of somebody engaging in open sex at LaSalle Park right where it could be readily seen?

[R227]

A. Yes.

Q. Have you ever given consideration to arresting somebody for public lewdness in that kind of a situation? A. Yes, I think there was something there but I don't know just what it was. I think it was advised by either the Corporation Counsel or the District Attorney's Office not to use that section unless you're — you positively had to.

Q. Can you describe for the Court what kind of situation it would be where you would feel positively had to use the Public Lewdness Statute? A. I don't know, I'd have to consult the section. Could I see the law there and would you point out the section to me. I think there was something there that required the intent to lewdly expose yourself.

Q. It's Section 245. A. It says with the intent to lewdly expose himself or engage in sexual acts or something — when he intentionally exposes a private part of his body in a lewd manner to commit such act. Yes, I think that's why I was advised not to use it unless we positively have to, but that was almost to prove the intent except by the acts, but I mean generally you have no conversation, these people won't say anything.



Q. I believe Officer Burgstahler testified at the last hearing,

[R228]

that in former years you had a congregation or number of homosexuals seeking companionship with other homosexuals that would go to North Street, but the male prostitute tended to be down in the Washington Street area but more recently as you've been cleaning up the downtown area, the prostitutes moved up to North Street, has that been your experience; in other words, that prostitutes on North Street is a more recent phenomenon perhaps because of more recent vigorous enforcement in the city? [sic] A. I would say generally speaking, that's what has happened along with homosexuals up there. In other words, what I'm saying is that it hasn't been my experience that the male prostitutes have taken over that area because they haven't, there is [sic] many many suspected homosexuals in that area.

Q. I understand. My point is, where as you find both just plain homosexuals and male prostitutes now, in earlier years you would tend to find just the homosexuals in the North Street area? A. Well, I'd say in the former years there were areas where there were just homosexuals in the Ellicott area down around Ellicott, Seneca Street, there were many of them in that area. In fact, we had a whole section there where homosexuals just cruised the block around and around and around walking

[R229]

in automobiles, and I don't recall male homosexuals being there. Now, they may have been without us knowing but we didn't have complaints or investigations didn't disclose that there were male homosexuals in that area and that's going back a good many years.

Q. Captain, I believe you've been quoted as expressing concern that this statute as not being declared unconstitutional in other words, you would like the statute to be upheld and not

struck down. Is that correct. I'm talking about the loitering statute? A. Well, I've expressed my opinion in the hope it would be upheld but that's up to the courts.

Q. I understand that, but we've been exploring generally in this hearing the need or the felt need that the law enforcement officers have for this statute to be available? A. Yes.

Q. That's what I'm directing myself to. As you look at what you perceived to be the problem in public areas of the city involving homosexuals or male prostitutes, is it your opinion that you need a statute to catch the homosexual who is simply inviting another homosexual to go home with him for some private sex or is the real need that you have effective legislation to be able to control the prostitute

[R230]

and male prostitute problem? A. No. I would say there's a crying demand for legislation and for a law to what we have now, the loitering law, to be effective in responding to complaints of groups of people say who are homosexuals saturating the area, committing other disorderly acts, urinating on their grass and so on and so forth, and walking up and down and soliciting people and I'd say that we have a prime need for the type of legislation that we can control this or do something to prevent this from happening and to respond to the public demand for police services. Now, these people have repeatedly told me why can't you do something about it and I can do something about it as long as I have the laws to work with but if the loitering section is taken away from us I don't have what will turn to.

Q. Okay. Just as a final question — I hope it's final, if a law were available and if the Courts would say the law was legal and therefore it can be used which permitted you to keep homosexuals from being together in public, I gather — I don't carry that to extremes but would make it possible to keep homosexuals from stopping and talking to each other on a public

street for an undue length of time, I gather that's the kind of statute you would like so you could meet .

[R231]

the complaints of a citizen. Is that right? A. No. I can't agree with that. Without the courts I think it's material to what —

Q. Listen to the question, excuse me. Would you please tell the Court what the need is as you on behalf of the Police Department see it, for the opportunity to arrest a man like Mr. Uplinger to stop and speak for ten, fifteen minutes with another man who was apparently happy to talk to him leading up to an invitation involving no money for the two of them to go away to a private place. Tell the Court why you feel that kind of statute is needed? A. Well, because this happens frequently and many people are offended by this type of approach and where it relates to a sexual act people don't like to be approached that way or be offended that way and people become frightened at this type of activity. People don't like to see it in front of their homes. Now, I've frequently come out in public and said if a group of homosexuals go and register in the Statler Hotel and go to their homes in private, which they're not out in the public where people can see them and they're not committing open sex acts and that which this innocent conversation that you referred to often leads to that, that leads to complaints for me. Like, these people will stop on

[R232]

a corner and this is where the police need is, they'll stop on the corner and have a conversation for a while and pretty soon they're into a car or in back of someone's side yard committing a sexual act or else if they're soliciting someone there's all kinds of acts that are offered here that call for police response or police action. But I — in no way do I just want a law where I see two persons together and walk up and say you're under arrest or you have to leave the area or something like that, we

wouldn't bother them if it wasn't for this overtone of offensive conduct and solicitation.

MR. GARDNER: Thank you very much, officer.

RE-EXAMINATION BY THE COURT:

Q. The problem is, how do you tell private from public, how do you tell what's going to happen from their conversation?

A. Well, that's why I feel, Your Honor, according to the statute now with conversation we have — whether it's in private or not, whether the other overt conversation is made for the act to take place where the act does place, I don't think there's any requirement there. In other words, if a man says I'm taking you to a home or taking you to a educational institution or something like that, I

[R233]

think the crime itself develops as a conversation where a Police Officer is involved.

THE COURT: I have nothing further.

MR. GARDNER: Nothing.

THE COURT: Thank you, Captain. Officer Nicosia, would you take the stand.

(OFFICER) STEVEN NICOSIA, 75 Franklin Street, Buffalo, New York, having been duly called and sworn as a witness on behalf of the People, was examined and testified as follows:

BY THE COURT:

Q. I just have two questions, officer. First of all, it wasn't clear how long this entire occurrence took whereby you ended up arresting, from the beginning to the end? A. Approximately ten to fifteen minutes, Your Honor.

Q. And there was something there about you being introduced to three or four people? A. Yes.



Q. Where did that take place? A. I was sitting on the steps of the Hotel Lenox on I believe it's 140 North Street.

Q. Did that happen before you met the defendant or when, during, after you met him?

[R234]

A. Slightly after I met the defendant.

Q. Would you relate how it happened? A. If I was sitting on the steps, the defendant was standing there talking, asking me questions like what I would like to do and do I want to get high, did I want to go to his place and then there were two others or three other males that approached the steps and apparently knew the defendant, they engaged in conversation and spoke to each other by first names.

Q. It didn't involve you then? A. No, Your Honor. I mean, I had no conversation other than —

Q. It was a short conversation and they left? A. Yes.

Q. This is before the police came up and made you move?  
A. They left when the police came.

Q. Were they still there talking when the police came up? A. Yes.

Q. It was after you that they moved out and there was more conversation which led to the arrest? A. Yes.

THE COURT: Any other questions?

MR. GARDNER: None.

[R235]

MR. LOKKEN: I have nothing.

THE COURT: Is there anything else?

MR. LOKKEN: Nothing else.

THE COURT: The hearing is closed. I'll reserve on it and get to you as soon as I can.

MR. GARDNER: Thank you, Your Honor.